Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

LEE BRENNEMAN,
Petitioner,

v.

MEDCENTRAL HEALTH SYSTEM,
Respondent.

Petition For A Writ of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the underlying court applied a legal test concerning unforeseeable leave under the FMLA that does not exist in the Sixth Circuit and thus fundamentally abrogated the Petitioner's rights under the FMLA.

Whether the underlying court erroneously determined that mixed questions of law and fact concerning notice issues under the FMLA are primarily questions of law when the Sixth Circuit had previously determined they are primarily questions of fact.

Whether the underlying court failed to properly apply the regulations concerning notice under the FMLA and the need for unforeseeable leave under the FMLA.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. B) is reported at *Lee Brenneman v. MedCentral Health System,* 366 F.3d 412 (6th Cir. 04/26/04).

The Memorandum of Opinion of the District Court of the Northern District of Ohio, Eastern Division in *Brenneman v. MedCentral Health System,* denying reconsideration is unreported and is set forth in the Appendix hereto (App. C).

The Memorandum of Opinion of the District Court of the Northern District of Ohio, Eastern Division in *Brenneman v. MedCentral Health System,* granting summary judgment is unreported and is set forth in the Appendix hereto (App. E).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 26, 2004. The Court of Appeals entered an order denying a timely petition for en banc panel rehearing on August 6, 2004.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Family and Medical Leave Act of 1993 and the Code of Federal Regulations.

In Particular, for unforeseeable leave the Code of Federal Regulations, 29 C.F.R. Section 825.303(a) states in pertinent part:

> When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

STATEMENT OF THE CASE

Petitioner Brenneman commenced this action against his former employer, MedCentral Health System (hereinafter referred to as "Respondent"), under the FMLA, the ADA, and relevant state law. Respondent moved for summary judgment and the trial court granted summary judgment as to all of Petitioner's federal and state law claims with prejudice.

Petitioner alleges that his employer violated the Family and Medical Leave Act (FMLA) by failing to offer and provide him with FMLA leave which he had qualified for under law as a diabetic who suffers from hypoglycemic attacks as they never informed Petitioner that his diabetic episodes qualified as FMLA leave; that Respondent was on notice that Petitioner is a diabetic since his first day of employment, that Petitioner's doctor, Dr. Cynthia Dorsey, MD, timely notified Respondent of his last hypoglycemic episode prior to the final decision of termination, as well as Petitioner's wife; and, finally, that the underlying court applied a test to the Petitioner's case concerning unforeseeable FMLA leave that does not exist in the Sixth Circuit- all fundamentally abrogating Petitioner's rights under the law.

Petitioner began working for Respondent in 1973. Petitioner was diagnosed with diabetes mellitus in July, 1968, when he was thirteen (13) years old. When the Petitioner initially applied for the job he stated at that time that he suffered from diabetes mellitus on his employment

application form.

Respondent knew Petitioner had diabetes since his workers' compensation medical reports indicate his diabetic condition, which slows healing. (App. B-4) (App. E-4) Moreover, Petitioner had a discussion with the previous Assistant Director, George Brown explaining that one of his absences occurred because his blood sugar was "messed up." (App. B-31) (App. E-6)

During his career at Respondent, Petitioner was an experienced, competent employee as indicated by his Performance Evaluations and Performance Competency Assessments. Throughout the years, Petitioner's diabetes has become more severe, consequently he has been using an insulin pump since December 1998. (App. B-3)(App. E-3)

Despite the remedial measures Plaintiff has taken regarding his health, Petitioner occasionally experiences hypoglycemic episodes (App. B-3)(App. E-3), during which he experiences symptoms such as seizures, shock, lightheadedness, and a feeling of being "drunk." (App. B-3)(App. E-3) His general treating physician, Dr. Peter T. Roemer, MD, states that he was a difficult diabetic to control and that he would have limited control over his hypoglycemic episodes until adjustments were made in his insulin doses.

Throughout his employment, there have been occasions on which the Plaintiff has missed workdays or part of workdays due to his diabetes. However, Respondent unnecessarily accumulated termination points for Petitioner

under its initial attendance policy which "carried-over" to its modified attendance policy. This errant point "carry-over" of non-pointable events triggered Petitioner's wrongful termination under the new attendance policy through an accumulation of excessive, but erroneous, points. Further, many, if not all of Petitioner's accumulated points, would not have been assignable to Petitioner under Respondent's Attendance Policy and FMLA Policy, had Respondent provided FMLA leave as they were required to do by law.

Despite the fact that his supervisors and the personnel in the Human Resources Department knew that Petitioner had diabetes, the Petitioner was never advised that the absences due to his diabetes condition were covered under the Family and Medical Leave Act.(App. B-27)

On March 31, 2000, Petitioner was absent from work due to a hypoglycemic episode and a workers' compensation doctor's appointment- **both absences being non-pointable under the FMLA, and, thus, Respondent's attendance system.** (App. B- 4) This final absence caused his wrongful termination although Petitioner called the employer that day and informed it that he "wasn't doing well and...wouldn't be in today." (App. B-4, B-21, B-23)

On April 4, 2000, Petitioner was informed that he was being terminated at a meeting with his supervisors. (App. B-4, B-21) On April 5, 2000, Petitioner's wife informed the employer that Petitioner was absent due to a diabetic episode. (App. B-21, B-27) On April 6, 2000, Petitioner attended an

interview with Respondent and presented a note from Dr. Cynthia Dorsey dated April 5, 2000, stating that the absence was due to an extended episode of diabetes-related hypoglycemia. (App. B-21, B-22)(App. E-7, E-22) Respondent then finalized Petitioner's termination (App. B-5) since Respondent wrote Petitioner accumulated too many points under Respondent's absentee point system. Petitioner contends, *inter alia,* that had he known his diabetic episodes were FMLA qualifying events under the law he would not have been terminated.[1]

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1. Further, there are serious questions of material fact surrounding not only when and how Petitioner was terminated, what and when notice was given to Respondent, how sufficient the notice was under the law, and whether Petitioner was terminated for alleged misconduct and/or miscalculated points under the attendance system that will be discussed *infra*. (App. B-15 to B-38)

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS APPLIED A TEST TO THE PETITIONER'S CASE CONCERNING UNFORESEEABLE LEAVE THAT DOES NOT EXIST IN THE SIXTH CIRCUIT AND HAS THEREFORE FUNDAMENTALLY ABROGATED PETITIONER'S RIGHTS UNDER THE LAW.

In this particular case, the underlying court has established a new "test" in the Sixth Circuit concerning sufficient notice under the FMLA for unforeseeable leave and in applying this test for the first time in Petitioner's case has fundamentally abrogated the Petitioner's rights under the law.

Specifically, the underlying court has stated that the:

> critical test for substantively-sufficient notice is whether the information that the employee conveyed to the employer was reasonably adequate to apprise the employer of the employee's request to take leave for a serious health condition that rendered him unable to perform his job. *Brohm, 149 F.3d at 523*; *Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 725 (6th Cir. 2003)* (App. B-17)***As stated above, the critical test for substantively-sufficient notice is.... (App. B-36)

In particular, neither the case of *Brohm v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir., 1998), nor the case of *Cavin* even mentions the term "substantively-sufficient." Furthermore, the word "substantively" does not appear in either opinion. *See Brohm and Cavin in their entirety.* By applying the standard of "substantively-sufficient" notice as a requirement upon the Petitioner, the underlying court placed an evidentiary burden, one not supported by the statute or its regulations, upon Petitioner that they have not placed upon other similarly situated Petitioners concerning unforeseeable leave under the FMLA in the Sixth Circuit, thereby fundamentally abrogating the Petitioner's rights under the law.

In *Brohm,* the portion of the opinion the underlying court cites also does not mention the "substantively-sufficient" test. On page 523, *Brohm* cites to *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 762 (5th Cir. 1995) in stating:

> the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious heath condition. *Id. at 764; see 29 U.S.C. §2612(e)(2)*(requiring employees to give 30 days' notice for **foreseeable** treatment of serious heath conditions). (emphasis added)

The Petitioner's case is concerned strictly with unforeseeable leave. Thus, in Petitioner's case, the Sixth Circuit has assumed the Fifth Circuit's "sufficiency" test for foreseeable leave under the FMLA and has established a "substantively-sufficient" test for unforeseeable leave. Further, the FMLA makes no such distinction in tests between foreseeable and unforeseeable leave. *See 29 U.S.C. §2612(e).*[2]

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2. (e) Foreseeable leave. (1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable. (2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee--(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and (B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable. *29 U.S.C. §2612(e).*

Finally, the underlying court misapplied the sufficiency test for unforeseeable leave under *Cavin* in relation to the Petitioner's case. While the Sixth Circuit stated the correct holding of *Cavin* in Brenneman, they failed to describe all the facts of *Cavin* and their particular relation to Petitioner's case. (App. B-36) In *Cavin*, the Sixth Circuit found that plaintiff's notice to the security company that worked at the employer's facility was sufficient to place the employer on notice that the employee needed unforeseeable FMLA leave. *Cavin*, at 725. In this case, the employer was placed on notice when the Petitioner applied for employment and that he suffered from a serious medical condition (App. B-37), and, further, Petitioner's **treating physician worked at the Respondent hospital** where the Petitioner was employed. Somehow, the underlying court determined that notice to a third party on premises security company was sufficient notice for Cavin and is insufficient notice for Petitioner, who advised his doctor, a staff member.

Therefore, the underlying court has established a new "test" in the Sixth Circuit concerning substantively sufficient notice under the FMLA for unforeseeable leave and in applying this test for the first time in Petitioner's case has determined that not only must notice be given within two or three days of leave as a matter of law, but the notice must also be "substantively sufficient" as a matter of law. Thus, the Petitioner's description of feeling sick, his wife's notice, and his doctor's letter were substantively insufficient as a matter

of law according to the Sixth Circuit, which is contrary to statute and the regulations on unforeseeable leave.

II.

THE COURT BELOW HAS ERRONEOUSLY DETERMINED THAT NOTICE ISSUES UNDER THE FMLA ARE PRIMARILY QUESTIONS OF LAW AND NOT FACT.

The underlying court has erroneously determined that fact intensive issues in this case are unpersuasive to create genuine issues as a matter of law, and, thus, have fundamentally abrogated the Petitioner's rights.

The Sixth Circuit has "characterized the issue of adequate notice under the FMLA as involving 'primarily questions of fact...not questions of law.' *Williams v. Schuller Int'l., Inc.* 29 Fed.Appx 306 (6th Cir. 2002)" *Cavin v. Honda of Am. Mfg.*, 346 F.3d 713, 723 (6th Cir. 2003). Yet, the underlying court completely ignores the fact intensive disputes in this case that create genuine issues to be determined by a trier of fact and dismisses them from being heard as a matter of law.

First, the Sixth Circuit states that:

> Plaintiff's complaint alleges that defendant unlawfully interfered with plaintiff's exercise of his rights under the FMLA by counting

> various absences that he alleges were FMLA-qualifying-absences on February 16, 1996; [***14] February 9, 1999; and March 31, 2000-under its "no-fault" attendance policy and by subsequently terminating plaintiff pursuant to that policy. The district court granted summary judgment to defendant on plaintiff's FMLA claim on the ground that plaintiff, as a matter of law, failed to give defendant sufficient notice of a FMLA-qualifying reason for these alleged diabetes-related absences. (App. B-19)

In doing so, the circuit court relies on the opinion of the district court that the February 16, 1996 incident only refers to "intestinal flu" relating to Petitioner's absence; on the second date the Petitioner "only informed his co-workers generally that he was having problems with his insulin pump" and; that Petitioner did not mention his diabetes on April 4, 2000 when he met with his supervisors. (App. E-24 to E-25)

All these fact intensive disputes create genuine issues of material fact to be determined by a trier of fact under *Williams* and *Cavin.* When assuming the disputed facts in a plaintiff's favor, a reasonable trier of fact could determine that intestinal flu is associated with diabetes; that general information to co-workers in reference to problems with an insulin pump with this employer's knowledge (*See*

arguments, supra) is material, and; that a reasonable plaintiff may not mention his illness at his termination because: 1) he did not have the requisite knowledge that his diabetes was FMLA qualifying, 2) the employer failed to inquire further into the facts as the law requires by asking him if his diabetes was the reason for his absence, and, 3) Petitioner did not know he was being terminated until the end of the meeting. (App. B-26 to B-29) Moreover, the Sixth Circuit agreed that Petitioner "would habitually state only that he was "ill" or "not feeling well" when he was experiencing a diabetes-related illness." (App. B-23) Out-of-circuit courts have held that amount of information to be enough for a trier of fact (*See Byrne, Spangler, Norman, Weeden, McNeela, and Konipol, infra*). Even the Sixth Circuit has held a similar amount of information should be presented to a tier of fact (*See Miller, Phillips, and Russell Stover Candies, infra*).

The Sixth Circuit even stated:

> Plaintiff testified that Carol Blackstone, defendant's Benefits Manager, told plaintiff that he should try to have the FMLA cover the [intestinal flu] absence, and gave him an FMLA form [**34] for his doctor to fill out. Plaintiff further testified that he followed Blackstone's suggestion even though it confused him because he did not know that

the FMLA covered the flu. (App. B-31)

Thus, the Sixth Circuit acknowledges that the Petitioner did not know that his diabetes was covered by the FMLA.(App. B-27) Yet, the underlying court stated that as a matter of law Petitioner failed to give adequate notice of his diabetes to the employer. (App. B-19, B-22, B-37)

Finally, the Sixth Circuit admits the "information that plaintiff [**25] gave defendant-via his wife's statement to Engle [April 5] or Dr. Dorsey's note [April 6]-**may have been sufficient** to convey to defendant that plaintiff's March 31st absence was due to a serious health condition that rendered [***16] him unable to perform his job" (App. B-22), the court went on to state that as a matter of law Petitioner failed to give the notice "within the necessary time frame for unforeseeable leave." (App. B-22) This is in direct conflict with the court's statement that on "April 6, 2000...Defendant, nevertheless, finalized plaintiff's termination." (App. B-5) Thus, it is a definitive question of material fact, even to the Sixth Circuit, whether the Petitioner was terminated on April 4, 2000, or April 6, 2000, with the requisite notice being given to the employer on April 5, 2000, by Petitioner's wife, or on April 6, 2000, by Petitioner in the note from Dr. Dorsey, dated April 5, 2000.

Therefore, the underlying court has erroneously determined that fact intensive issues in this case are unpersuasive to create genuine issues as a matter of law.

III.

THE COURT BELOW FAILED TO PROPERLY APPLY THE REGULATIONS CONCERNING NOTICE AND THE NEED FOR UNFORESEEABLE LEAVE UNDER THE FMLA.

A. The underlying court failed to apply the properly stated rule of law in this case.

The underlying court failed to apply the properly stated rule of law in this case and has severely prejudiced the Petitioner's rights. The FMLA regulations place the responsibility on the employer to **insure** that employees apply for FMLA leave whenever it is appropriate, even without the employee's initiative. *29 C.F.R. Sections 825.301(a) and (c) and 825.303(b).*

Specifically, the Family and Medical Leave Act of 1993, under Subpart C- "HOW DO **EMPLOYEES LEARN** OF THEIR FMLA RIGHTS AND OBLIGATIONS, AND WHAT CAN AN EMPLOYER REQUIRE OF AN EMPLOYEE? WHAT OTHER **NOTICES TO EMPLOYEES ARE REQUIRED OF EMPLOYERS** UNDER THE FMLA?" Section 825.301(a)(2)(b)(1) states that:

> The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these

> obligations. The written notice must be provided to the employee in a language in which the employee is literate (*see Section 825.300(c)*). Such specific notice must include, as appropriate: (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (*see Section 825.305*).

In addition, Section 825.301(c) states:

> Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period).

Thus, the FMLA regulations require employers to issue two forms of notice to employees: first, a generalized notice posted at the employer's premises under 29 U.S.C. Section 2619(a), which is not applicable to this matter, and; second, a customized notice of FMLA rights and procedures issued to an employee who indicates a need to take leave for an FMLA-qualifying purpose under 29 C.F.R. Section 825.301 (a) and (c) and 825.303(b), which is directly relevant to this appeal. *See Knussman v. Maryland* (D.C. Md.

1998), 16 F.Supp.2d 601.

Here, the underlying court ignored the fact that the employer failed in their responsibility to insure that the Petitioner applied for FMLA leave when it was appropriate, even without the Petitioner's initiative. **The Petitioner was to be given specific notice from the employer for all of his absences** to see if they qualified for FMLA coverage. Thus, it is a question of fact whether Petitioner's conduct meets the FMLA requirements and whether the Petitioner was denied his FMLA rights as a result of the lack of specific notice. *See DeCesare v. Niles City School Dist. Bd. of Ed.* (11th Dist., 2003), 154 Ohio App.3d 644, 798 N.E.2d 655.[3] The underlying court noted that Petitioner did not need to wait to obtain the letter from the doctor to apply for FMLA. (App. B-21, B-26) Under the regulations, the employer should have provided him with specific notice and the medical form the minute Engle heard of the

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3. In *DeCesare,* the court found employer "satisfied the general posting requirement, it did not satisfy the customized posting requirement[]" where plaintiff requested a FMLA qualifying leave, "she was entitled to notice so that she could explore her options, including applying for leave under FMLA." *DeCesare* at 647. Although defendant contended that plaintiff did not qualify for FMLA leave, "this fact did not relieve the Board of its duty to discuss the FMLA with DeCesare so that she was aware of her options." *Id.* Further, the court found that "the Board did not notify DeCesare of her rights under the FMLA, nor did DeCesare specifically request or apply for leave under the Act. This issue needs to be decided by a trier of fact." *Id.* at 648.

diabetes related qualifying absence and Petitioner's wife's request. (App. B-21 to B-22, B-27)

Further, while the employer may have issued informal notices detailing the FMLA to its employees, the regulations require that those notices include language referring to the consequences of failing to comply with procedure. For example, 29 C.F.R. Section 825.301(a)(2)(b)(1) mandates that the written notice issued by the employer detail "the specific expectations and obligations of the employee and **[explain] any consequences of a failure to meet these obligations[.]"** Further, the employer's written notice must include, as appropriate "any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so...." *29 C.F.R. Section 825.301(a)(2)(b)(1)(ii).* (emphasis added)

The underlying court points out that "the record makes clear and as [plaintiff] acknowledged in his deposition, plaintiff, over the course of his employment, received several informational notices from defendant specifying that the FMLA may cover diabetes as a chronic health condition." (App. B-27) However, the notices are arguably defective as a matter of law as the notice failed to adequately inform employees of their FMLA rights and obligations and are silent as to any consequences for an employee's failure to meet his/her obligations under the FMLA, like notice, and for failure to meet his/her medical certification requirements under the FMLA.

It is appropriate that the employer articulate in writing the consequences any employee, including Petitioner, would face in failing to meet their obligations, like notice and medical certification requirements under the FMLA In the case of the February 16, 1996 intestinal flu incident, the Petitioner qualified under 29 C.F.R. Section 825.114(b) with 3 days of absence, bed rest, and a visit to the doctor, yet was improperly denied leave. The employer's FMLA Policy was silent as to the consequences of Plaintiff's failure to qualify for leave.

In addition, it is incumbent upon this employer to adequately appraise the employee of any penalty or consequences with specific notice enough that any reasonable employee may understand their rights and obligations under the FMLA so as not to potentially lose their rights under law. Thus, without consultation and specific individualized notice of rights and responsibilities, the employer abrogated Petitioner's rights as they have failed to provide the Petitioner with specific notice as mandated by the FMLA.

Further, there is a genuine question of material fact as to whether the employer's specific Notice form, or some other form, was issued to and received by Petitioner in 1993, 1994, 1997 or anytime after those years, and whether Petitioner was given his Notice no less than the first time in each six-month period that an employee gives notice of the need for FMLA leave. *29 C.F.R. §825.301(c).*

Moreover, the regulations require a more individualized approach by the employer upon an employee's nebulous request for leave due to an FMLA-qualifying

purpose. *29 C.F.R. §825.303(b)* ('The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional information through informal means.") The employer's informational Notice alone is insufficient to meet the FMLA regulations as the employer, faced with the allegedly unclear notice, was obligated to obtain additional information from Petitioner concerning each of his FMLA leave qualifying events, i.e., his February 9, 1999 absence due to "problems with his diabetes" (App. B-23, B-30, B-35 to B-37), and the date of his last FMLA qualifying absence, March 31, 2000.

Thus, the underlying court failed to apply the properly stated rule of law in this case as there are genuine questions of fact as to whether the employer met the FMLA's specific notice requirement, conducted inquiries, and whether through the employer's actions, Petitioner was denied his rights under the FMLA.

B. Under the rules of statutory construction, the underlying court should not narrow the notice provisions of 29 C.F.R. §825.303(a).

The Sixth Circuit court in applying the underlying statute, the Family and Medical Leave Act (29 U.S.C. §2601, *et. seq.* or "FMLA") and its Code of Federal Regulations corollary (29 C.F.R. 825.303(a)), failed to properly analyze

the regulation designed for the protection of an employees' need for medical leave when that leave is unforeseeable. (App. B-20 to B-29) Under the regulation, employees like Petitioner "should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case" and are expected to give notice to the employer "within no more than one or two working days...except in extraordinary circumstances where such notice is not feasible." *29 C.F.R. 825.303(a)* (App. B-17 to B- 18)

The FMLA notice regulation specifically uses the word "should" not "shall," thus contemplating that an employee would be given some latitude in conveying his need for leave and, further, modified the notice provision by stating "as soon as practicable under the facts and circumstances of the case[,]" thereby creating an individualized fact-based determination of what is sufficient notice. *29 C.F.R. Section 825.303(a).*[4]

Further, the regulation uses the word "expected" that notice will be provided "within no more than one or two working days **of learning of the need for leave;...**" *29 C.F.R.*

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4. In *Arban v. West Publishing Corp.*, 345 F.3d 390 (6th Cir. 2003), the court discussed the term "shall" as defined in both the FMLA and Fair Labor Standards Act in the context of remedial provisions and determined its precise application in that context.

Section 825.303(a).(emphasis added) Therefore, the underlying court's declaration that as a matter of law Petitioner failed to provide notice within one or two working days flies against the rules of statutory construction. (App. B-24) By stating the necessary time frame for proper notice is one or two days as a matter of law the underlying court completely ignores the individualized analysis required by the terms "facts and circumstances of the case" and "learning of the need for leave." *29 C.F.R. Section 825.303(a).* Had the Department of Labor intended one or two working days to serve as the appropriate notice, it would have written clearly that an employee shall provide notice to an employer within one or two working days for unforeseeable leave.

Moreover, the one or two day notice language is further modified by the phrase "when a [plaintiff] learns of the need for leave." *Id.* The underlying court conceded that it was Dr. Dorsey and Bruce Engle in the exit interview who educated Petitioner that his diabetes should have been covered under FMLA. (App. B-5) Thus, Petitioner did not learn of FMLA intermittent leave covering diabetes until Dorsey and Engle advised him and his wife of the coverage. Further, the underlying court indicated that no extraordinary circumstances existed to render it unfeasible for Petitioner to have given notice to the employer within two working days even though the court acknowledged the employer's failure to inform Petitioner that the FMLA covered diabetes and permitted intermittent leave for a medical condition such as

his. (App. B-26 to B-27) Extraordinary circumstances exist due to the fact that the Petitioner never knew his diabetic episodes were covered under the FMLA.

In addition, by holding as a matter of law that necessary notice should be given within one or two working days, the underlying court eviscerates the end of the regulation which reads "except in extraordinary circumstances in which notice is not feasible." *Id.* The phrase "extraordinary circumstances" was to extend the term within one or two working days of when the employer learns of the need for FMLA, not to cut the notice further. Again, if the Department of Labor intended a flat out rule of one or two working days, it would have written that notice "shall be provided" to the employer within one or two working days, and not conditioned the rule with the phrases "expected" or of when "the employee learns of the need for leave" or placed a comma after the word "leave" before the phrase "extraordinary circumstances." *Id.*

Therefore, the underlying court has attempted to narrow the notice provisions of 29 C.F.R. §825.303(a), and, as such, has denied the Petitioner his rights under the FMLA.

C. The underlying court completely ignored the facts and circumstances concerning unforeseeable leave and stated notice involves primarily questions of law when FMLA notice cases are generally so fact intensive as to be considered primarily questions of fact.

The Sixth Circuit court completely ignored the mixed questions of fact and law in applying the underlying statute. Specifically, the Sixth Circuit has stated that:

> "When discussing notice requirements in other statutory contexts, this court has said that 'adequacy of notice is consistently regarded as a finding of mixed fact and law. *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245, 1249 (6th Cir. 1988)...In a recent unpublished opinion, however, a panel of this court characterized the issue of adequate notice under the FMLA as involving 'primarily questions of fact...not questions of law.' *Williams v. Schuller Int'l., Inc.* 29 Fed.Appx 306 (6th Cir. 2002)" *Cavin v. Honda of Am. Mfg.*, 346 F.3d 713, 723 (6th Cir. 2003).

An employee is not required to assert his rights under the FMLA. *See 29 C.F.R. Section 825.303(b); George v.*

Associated Stationers, 932 F.Supp. 1012, 1016 (N.D. Ohio 1996); *See also 29 U.S.C. § 2601, et seq.*[5] "[A]n employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work." *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). Moreover, "[w]hat is practicable, both in terms of the timing of the notice and its content, will depend on the facts and circumstances of each individual case." *Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995).* Once an employee gives notice of a need for leave that may be FMLA- qualified, it is the employer's duty to inquire further to determine whether the FMLA applies. *Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (7th Cir. 1997).*

There are numerous cases where significant facts have been recognized by courts precluding summary judgment in jurisdictions outside of the purview of the Sixth Circuit. A few notable cases include: *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003)(employee with four year record of strong performance placed employer on notice of his need for FMLA leave based only upon unusual behavior); *Spangler v.*

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5. Congress authorized the Secretary of Labor to promulgate regulations necessary to carry out the FMLA. *See 29 U.S.C. §2654.* The Sixth Circuit has held that these regulations are to be given "controlling weight." *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000).

Federal Home Loan Bank of Des Moines, 278 F.3d 847, 852-3 (8th Cir. 2002)(even where an employee's notice for missing work was "untimely, or was unclear and otherwise inappropriate, or was even in violation of the [employer's] reasonable notice policy[,]" when the employer knew the employee suffered from depression and knew she needed leave in the past for depression, the court found that a genuine issue of material fact existed as to appropriate notice under the circumstances); *Norman v. Southern Guaranty Ins. Co.*, 191 F.Supp. 1321, 1333 (M.D. Ala. 2002)(the court found that "knowledge of some members of the supervisory staff of Southern Guaranty of Norman's bouts with depression, creates a jury-triable issue as to the FMLA claim."); *Weeden v. Sears Roebuck & Company*, 1999 U.S.Dist. LEXIS 22495 (N.H. Dist., 1999)(dispute whether plaintiff was terminated after phoning work May 14 stating he felt sick, when he contacted manager May 19 or 20, or when he faxed in doctor's note on May 21 precluded summary judgment on FMLA notice); *McNeela v. United Air Lines, Inc.*, 1999 U.S. Dist. LEXIS 20042 (N.D. Ill., 1999)(summary judgment precluded on FMLA notice where employer knew plaintiff were involved in accident and conflicting statements from plaintiff and defendant as to whether they spoke over phone from hospital), and; *Konipol v. Restaurant Associates*, 2002 U.S. Dist. LEXIS 22439 (S.D.N.Y., 2002)(summary judgment precluded on FMLA notice where employer knew plaintiff had serious health condition and simply stated she would not

be in due to being ill, as well as questions of fact as to receipt of medical note).

In addition, there are cases within the Sixth Circuit that offer conflicting results based upon similar law and fact, including; *Miller v. GB Sales & Service, Inc.*, 275 F.Supp.2d 823, 829 (E.D.S.D. Mich., 2003)(court stated that, "[w]hat GB fails to understand, however, is that its knowledge of Miller's serious health conditions [Diabetes Mellitus and Depression] placed the burden on it to inquire further whenever Miller called in sick for medical reasons to determine if those reasons were FMLA qualifying.")[6]; *Phillips v. Leroy-Somer North America, et al.*, 2003 U.S. Dist. LEXIS 5334 (W.D. Tenn., 2003)(material issues precluding summary judgment where evidence of absenteeism, misconduct, and FMLA leave in dispute); *Taylor v. Invacare*, 64 Fed.Appx. 516, 519 n3, 2003 U.S. App. LEXIS 10318 (6th Cir. 2003)(employee returned to work after a brief hospital stay with a doctor's note that placed employer on notice of need for FMLA leave), and; *George v. Russell Stover Candies, Inc.*, 2004 U.S. App. LEXIS 15010 (6th Cir., 2004)(the court found that the defendants were improperly granted summary judgment on claims that they denied the employee's request

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6. In the case on appeal, Petitioner suffers from Diabetes Mellitus which the Respondent **Hospital**, Petitioner's **treating hospital**, knew he was afflicted with since he first applied for work at the hospital on or about 1973.

for FMLA leave for July and August of 1997, as there were fact issues as to whether the employee had requested pregnancy-related leave in August when defendants alleged that plaintiff had not informed them she was pregnant until October).

The Petitioner contends that he gave proper notice to the employer three times: first, when he telephoned the employer on March 31, 2000 (date of illness) (App. B-4, B-21, B-26 to B-27); second when his wife notified the employer personally on April 5, 2000 (App. B-21, B-27), and; third when the employer received Dr. Dorsey's letter on April 6, 2000. (App. B-5, B-21) Further, the Petitioner contends that he did not notify the employer at the April 4, 2000 meeting of his diabetes absence because he was not asked why he had been absent on March 31, 2000. The underlying courts both completely ignored the Petitioner's wife's statement to the employer and the Petitioner's testimony that he had not been asked at the April 4, 2000, meeting why he had been absent on March 31, 2000.

Moreover, the underlying court recognized that the Petitioner was not terminated until April 6, 2000, **after** presenting a note from his treating physician that his absence was due to an FMLA qualifying event. (App. B-5) Finally, the underlying court indicated that no extraordinary circumstances existed to render it unfeasible for Petitioner to have given notice to the employer within two working days (B-25 to B-26) even though the court acknowledged the

employer's failure to inform Petitioner that the FMLA covered diabetes and permitted intermittent leave for a medical condition such as his. (App. B-27)

Thus, the underlying court completely ignored the mixed questions of fact and law concerning unforeseeable leave and their application to the regulation that created genuine issues precluding summary judgment, and, as such, has denied the Petitioner his rights under the FMLA.

CONCLUSION

For all of the foregoing reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit, and, ultimately, to vacate and reverse the order below and remand the matter to the district court for trial. Without such an order, employees subject to the unforeseeable leave provisions of the FMLA will be subject to a narrowed interpretation of the statute by the underlying court; they will be subject to notice provisions being primarily questions of law; and, they will be subject to a test that does not exist in the underlying court.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
04-645 NOV 4 - 2004
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

LEE BRENNEMAN,
Petitioner,

v.

MEDCENTRAL HEALTH SYSTEM,
Respondent.

Petition For A Writ of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX

SIXTH CIRCUIT COURT ORDER A-1

SIXTH CIRCUIT COURT OPINION B-1

NORTHER DISTRICT OF OHIO, EASTERN DIVISION
MOTION FOR RECONSIDERATION OPINION . C-1

NORTHER DISTRICT OF OHIO, EASTERN DIVISION
ORDER D-1

NORTHER DISTRICT OF OHIO, EASTERN DIVISION
OPINION E-1

APPENDIX A

No. 02-3623
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEE R. BRENNEMAN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs-	)	ORDER
	)	
MEDCENTRAL HEALTH SYSTEM,	)	
	)	
	)	
Defendant-Appellee.	)	

JUDGES: BEFORE: KENNEDY, ROGERS, and, COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied..

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEE R. BRENNEMAN,	)	
	)	No. 02-3623
Plaintiff-Appellant,	)	
	)	
vs-	)	
	)	
MEDCENTRAL HEALTH SYSTEM,	)	
	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 01-01052- John M. Manos, District Judge
Argued: March 18, 2004
Decided and Filed: April 26, 2004

Before: KENNEDY, ROGERS, and COOK, Circuit Judges

COUNSEL: ARGUED: Natalie F. Grubb, Medina, Ohio, for Appellant. Michael N. Chesney, FRANTZ WARD, Cleveland, Ohio, for Appellee.
ON BRIEF: Natalie F. Grubb, Medina, Ohio, for Appellant. Michael N. Chesney, Michael J. Frantz, FRANTZ WARD, Cleveland, Ohio, for Appellee.

OPINION BY: KENNEDY

KENNEDY, Circuit Judge. Plaintiff Lee Brenneman ("plaintiff") filed suit against his former employer

MedCentral Health System ("defendant"), alleging disability discrimination in violation of the federal Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et. seq., and the Ohio Revised Code § 4112.02 as well as a violation of the federal Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 et seq. n1 Plaintiff appeals the district court's award of summary judgment in favor of defendant on these claims. For the reasons explained below, we AFFIRM the district court's grant of summary judgment to defendant. [**2]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Plaintiff also alleged state-law claims of promissory estoppel, intentional infliction of emotional distress, and wrongful discharge contrary to public policy, on which the district court, in a single order, also awarded defendant summary judgment. While plaintiff, per his notice of appeal, purports to appeal the district court's entire summary judgment order, plaintiff has presented no argument on these state-law claims in his briefs and, thus, has failed to preserve such claims for appeal. See Sommer v. Davis, 317 F.3d 686, 691 (6th Cir. 2003) (holding that the HN1appellants abandoned an issue for purposes of appeal where they failed to argue it in their briefs).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

I. Background

The record reveals the following facts. Plaintiff Brenneman

worked in defendant [*416] MedCentral Health System's Pharmacy Department for approximately twenty-seven years. Although he began his employment in 1973 as a Pharmacy Helper, he received a promotion to Pharmacy Technician in 1975. Plaintiff remained in this [**3] position throughout the rest of his employment. Plaintiff was diagnosed with diabetes mellitus [***3] in 1968. Although he sometimes has episodes of hypoglycemia, in which he can experience seizures, shock, and/or lightheadedness and incoherence, plaintiff generally controls his condition with insulin. Plaintiff also controls his diabetes by regulating his diet, exercising, and monitoring his blood sugar level throughout the day using a glucometer. Since 1998, plaintiff, whose diabetes has worsened with age, has used an insulin pump to control this condition.

During the course of his employment, plaintiff had substantial attendance deficiencies. According to his employment records, plaintiff had 193 unapproved absences and 34 late arrivals or early departures during his employment. These attendance deficiencies chiefly related to medical problems other than plaintiff's diabetes, such as six work-related injuries and other general illnesses. Defendant granted plaintiff FMLA leave on five occasions, none of which was for diabetes. Per its attendance policy, defendant disciplined plaintiff numerous times for his attendance problems. For example, plaintiff received a number of verbal [**4] and written warnings and suspensions. Although each disciplinary form affords the employee an opportunity to respond to the disciplinary action, plaintiff never once protested the imposition of discipline or mentioned his diabetes.

On March 31, 2000, plaintiff informed defendant that he "wasn't doing well and . . . wouldn't be in" that day. At that time, he did not mention that his absence was in any way related to his diabetic condition. On April 4, 2000, plaintiff met with his supervisors, Thomas Arkwright ("Arkwright"), the Director of Pharmacy Services, and Brian George ("George"), the Assistant Director of Pharmacy Services, regarding his attendance deficiencies. During this meeting, however, plaintiff never referenced his diabetes as the reason for his latest absence. Under defendant's attendance policy, this absence triggered another suspension of plaintiff. Moreover, pursuant to that policy, this suspension triggered plaintiff's termination because it was his third attendance-related [***4] suspension within five years. Thus, at the conclusion of the meeting, plaintiff was terminated.

On April 6, 2000, plaintiff requested and attended a final exit interview with Bruce [**5] Engle ("Engle"), defendant's Vice President of Human Resources. Plaintiff, for the first time, mentioned that his March 31st absence was due to his diabetes. Specifically, plaintiff presented a note from Dr. Cynthia Dorsey, his diabetes specialist, stating that the absence was due to an extended episode of diabetes-related hypoglycemia. Defendant, nevertheless, finalized plaintiff's termination. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Defendant contends that plaintiff's apparent dishonesty during this exit interview afforded an additional ground upon which to terminate plaintiff, pursuant to its general

disciplinary policy. Twice during the meeting, Engle asked plaintiff what he had done on March 31st, the day of his final absence. Twice plaintiff answered that he had been sick and had remained at home in bed all day. Engle, however, had learned that plaintiff had seen his workers' compensation doctor on that same day for non-diabetes-related reasons. When Engle confronted plaintiff with this information, plaintiff admitted that he had not, in fact, spent the entire day in bed. Plaintiff told Engle that he had simply forgotten about the appointment. Plaintiff testified that he had sufficiently recovered from his alleged hypoglycemic attack to drive himself approximately thirty-six miles round-trip to his workers' compensation doctor's appointment at 10:30 a.m. Plaintiff further testified that he was, nevertheless, not well enough to return to work. Defendant concedes, however, that this apparent misrepresentation by plaintiff was not a factor in its decision to terminate plaintiff; rather, according to defendant, it terminated plaintiff pursuant to its attendance policy. Thus, while this post hoc, additional ground for plaintiff's termination may be relevant to the calculation of any damages, it is irrelevant to the determination of whether defendant improperly terminated plaintiff under the ADA or the FMLA in the first instance. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-62, 130 L. Ed. 2d 852, 115 S. Ct. 879 (1995) (explaining that, HN2when an employer discovers an employee's wrongdoing after improperly terminating the employee on other grounds, "as a general rule . . . neither reinstatement nor front pay is an appropriate remedy . . . . The beginning point in the . . . formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date [that] the new information was

discovered").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**6] [***5]

[*417] II. Analysis

HN3We review the district court's order granting summary judgment de novo. Williams v. Mehra, 186 F.3d 685, 689 (6th Cir. 1999). HN4Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). HN5A "material" fact is one "that might affect the outcome of the suit." Anderson v. Liberty Lobby, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). HN6A "genuine" issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 255. HN7We must accept the non-moving party's evidence, and draw all justifiable inferences in his favor. Id. HN8"We may affirm a decision of the district court if correct for any reason, including one not considered below." See United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 330 F.3d 747, 750 (6th Cir. 2003).

A. Disability Discrimination [**7]

HN9The ADA proscribes discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application

procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. HN10Under the ADA, an employer's denial of employment opportunities to an employee with a disability may constitute such unlawful discrimination if the denial is based upon the employer's need "to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 U.S.C. § 12112 (b)(5)(B) (1991). HN11To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate that: "(1) he is disabled; (2) he is otherwise qualified for the position with or without reasonable accommodation; (3) he suffered an adverse employment decision; (4) his employer knew or had reason to know of his disability; and (5) his [***6] position remained open." Hammon v. DHL Airways, Inc., 165 F.3d 441, 449 (6th Cir. 1999). HN12Once a plaintiff establishes a [**8] prima facie case of disability discrimination, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action against plaintiff. Brohm v. JH Properties, Inc., 149 F.3d 517, 520-21 (6th Cir. 1998) Once the employer discharges this burden of production, the employee must demonstrate that the [*418] proffered reason was, in fact, a pretext for unlawful disability discrimination. Id. at 521. The plaintiff always retains the ultimate burden of persuasion. Plant v. Morton Int'l, Inc., 212 F.3d 929, 936 (6th Cir. 2000).

Because neither party has argued that an action for handicap discrimination under Ohio law entails a different legal analysis than that for disability discrimination under the ADA, and because Ohio case law tends to suggest that

it entails the same legal analysis as that under the ADA, we will analyze plaintiff's state and federal discrimination claims under Ohio Revised Code § 4112 and the ADA, respectively, solely under the ADA. See Plant, 212 F.3d at 938-39 (noting that Ohio case law seems to support the proposition that [**9] the ADA analysis applies to a Ohio claim of disability discrimination, and assuming so for purposes of its analysis because the parties have not argued otherwise); Martin v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ., 209 F.3d 931, 934 n.2 (6th Cir. 2000) (holding that "both federal and Ohio disability discrimination actions require the same analysis"); City of Columbus Civil Serv. Comm'n v. McGlone, 82 Ohio St. 3d 569, 1998 Ohio 410, 697 N.E.2d 204, 206-07 (Ohio 1998) (holding that, to establish a prima facie case of handicap discrimination under Ohio law, which is "similar" to the ADA, a plaintiff must show that: 1) he was handicapped; 2) the employer took an adverse action against him, at least in part, because of his handicap; and 3) the plaintiff, "though handicapped, can safely and substantially perform the essential functions of the job in question," and noting that Ohio courts may look to the ADA for guidance in the interpretation of Ohio law). But see Wooten v. City of Columbus, 91 Ohio App. 3d 326, 632 N.E.2d 605, 611 (Ohio Ct. [***7] App. 1993) (holding that Ohio disability discrimination law is "at least as broad, if [**10] not broader, in scope than" the ADA) (emphasis added).

The district court granted summary judgment for defendant on plaintiff's state and federal disability discrimination claims on the ground that plaintiff had failed to establish a prima facie case of such discrimination; specifically, the district court held that plaintiff was unqualified due to his

inability to satisfy defendant's basic attendance requirements. n3 We agree with the district court that plaintiff, as a matter of law, has failed to establish that he was otherwise qualified for the position of Pharmacy Technician with or without reasonable accommodation. Plaintiff's disability discrimination claims hinge upon defendant's failure to grant plaintiff the reasonable accommodation of FMLA leave for his diabetes-related absences and defendant's ultimate termination of plaintiff under its attendance policy based upon its assessment of points for these diabetes-related absences.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 As to plaintiff's failure to establish a prima facie case, the district court also held that plaintiff could not base his disability discrimination claim on any alleged refusal by defendant to accommodate plaintiff by granting him leave for his diabetes because plaintiff had never requested any such accommodation from defendant. The district court also granted summary judgment for defendant on the alternative ground that, even if plaintiff were to have established a prima facie case of disability discrimination, he, nevertheless, failed to demonstrate that defendant's proffered legitimate reasons for plaintiff's termination were a pretext for disability discrimination.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**11]

However, even if defendant had granted plaintiff medical leave for those absences which plaintiff specifically alleges

were diabetes-related-absences on February 16, 1996; February 9, 1999; and March 31, 2000-, n4 plaintiff, as a matter [***8] of [*419] law, would not have been qualified to perform the essential functions of the Pharmacy Technician position due to his excessive absenteeism. See Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998) HN13("An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."); Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 781-82 (6th Cir. 1998) (holding that medical leave may be a reasonable accommodation under the ADA, there is no presumption that uninterrupted attendance is an essential job requirement, and that the employer must demonstrate that such leave would be unreasonable and impose an undue burden upon it, but noting that the plaintiff, nevertheless, bears the burden of proving that she was qualified for the position with such accommodation); Hayes v. Cleveland Pneumatic Co., 92 Ohio App. 3d 36, 634 N.E.2d 228, 232 (Ohio Ct. App. 1993) [**12] (holding that plaintiff, for purposes of his Ohio handicap discrimination claim, failed as a matter of law to demonstrate that he was capable of performing one of the essential functions of his job-regular attendance-due to his excessive absenteeism). The district court found that, based upon George's affidavit and its supporting documentation, plaintiff had been absent 193 times and had arrived late or left early on 34 occasions within the five years preceding his termination. Plaintiff claims that the payroll and clocking reports attached to George's affidavit are not the documents upon which George relied in calculating plaintiff's attendance points. Rather, according to plaintiff, George calculated the attendance points based upon a

four-page spreadsheet, which plaintiff presented him with and questioned him about during [***9] his deposition. Moreover, plaintiff underscores that George, during his deposition, counted only five and one-third attendance points from that spreadsheet-an amount insufficient for defendant's entrance into the new attendance point system, under which defendant was ultimately terminated. n5 However, George testified that the referenced spreadsheet was [**13] a document that he had [*420] prepared for an unemployment compensation hearing after plaintiff's termination. George further testified that he would not have used this spreadsheet in calculating plaintiff's attendance points, and that he had used other documents, such as point reports and call-off sheets, that were not before him during his deposition. Thus, plaintiff, in attempting to manufacture a genuine issue of material fact, misconstrued George's testimony; George never testified-nor does any record evidence show-that he relied on this spreadsheet in calculating plaintiff's attendance points. Alternatively, plaintiff argues that a document entitled "Leave of Absence History," which provides that plaintiff, since 1995, had 43 absences from non-work-related injuries and 66 absences from work-related injuries, refutes defendant's contention that plaintiff had 227 absences. However, as defendant points out, [***10] this document details only plaintiff's absences for which defendant granted him formal leaves of absence. In any event, plaintiff seems to concede that he has been absent on 109 occasions since 1995.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 Although plaintiff argues that he should have received

medical leave for certain other diabetes-related absences, absences for which he simply informed defendant that he was "ill" or "not feeling well," we decline to consider these absences in our analysis since, as a matter of law, they do not constitute a request for leave as an accommodation for his diabetes. While plaintiff claimed that he would often relay this explanation when he was experiencing diabetes-related illnesses, this statement would not have reasonably apprised defendant that the absences were related to a disability rather than some general illness. See Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046-47 (6th Cir. 1998) HN14("The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation."). [**14]

n5 Plaintiff argues that defendant's attendance policy was neither uniform nor uniformly applied because each department had it own attendance guidelines. Beth Hildreth ("Hildreth"), defendant's Human Resources Manager, testified that each department, including the Pharmacy Department, had its own attendance guidelines and that these could deviate as to the threshold that the employees must pass to enter into the system-wide attendance point system. However, Hildreth testified that the system-wide attendance point system uniformly applied to each employee who entered that system. Defendant has provided evidence of three, non-disabled employees in the Nursing Department whom it terminated for excessive absenteeism under its new attendance point system. Plaintiff does not dispute this evidence. Rather, plaintiff seems to argue that

his accumulation of seven and one-third points so as to enter the attendance point system in the first instance was pursuant to a non-uniformly applied attendance policy. Because plaintiff has offered neither evidence of nor any meaningful argument on the alleged disparate application of the Pharmacy Department's attendance guidelines, we decline to consider such an argument.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**15]

According to Arkwright's affidavit, regular attendance is an essential function of the Pharmacy Technician position, which entails preparing and delivering medications to hospital patients, ordering, receiving, and stocking medications, and posting charges to patients' accounts. Clearly, plaintiff could not perform these duties when absent from defendant's premises. Arkwright further testified that plaintiff's excessive absences placed a great strain on the Pharmacy Department. Specifically each time plaintiff was absent, Arkwright would have to either call in an unscheduled employee to cover plaintiff's shift or else reassign plaintiff's duties to employees who were already scheduled to work. Consequently, according to Arkwright, plaintiff's excessive absenteeism increased both employees' workloads and the department's pay-roll expenses and decreased the Pharmacy Department's morale. While Arkwright tried to carry a number of pharmacy employees whom he could call-in to work at a moment's notice to cover for an absent technician, it does not follow, as plaintiff contends, that plaintiff's absences did not prejudice defendant whatsoever. Arkwright's testimony shows otherwise. In sum, [**16] plaintiff, as a matter of law, has

failed to demonstrate that he was qualified to perform the essential functions of the Pharmacy Technician position, even if he had received medical leave as a reasonable accommodation for his diabetes; rather, the record is replete with evidence of plaintiff's excessive absenteeism, which rendered him unqualified for that position. n6 Thus, the district [***11] court properly granted defendant summary judgment on plaintiff's disability discrimination claims under the ADA and Ohio law.

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n6 In so holding, we need not and do not express any opinion upon whether plaintiff has satisfied the other elements of a prima facie claim of disability discrimination or whether he has sufficiently demonstrated that defendant's proffered non-discriminatory reasons are pretexts for disability discrimination.

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B. FMLA Violation

HN15The FMLA affords an eligible employee up to twelve weeks of leave within a twelve month period when the employee suffers from "a serious health condition that [**17] makes the employee unable to perform the functions of . . . [his] position," among other qualifying reasons. 29 U.S.C. § 2612(a)(1)(D). HN16The term "serious health condition" signifies "an illness, injury, impairment, or physical or mental condition that involves . .

. (A) inpatient care in a hospital, hospice, or residential medical care facility or (B) continuing treatment by [*421] a health care provider." 29 U.S.C. § 2611(11); see 29 C.F.R. § 825.114 (defining "inpatient care in a hospital, hospice, or residential medical care facility" and "continuing treatment by a health care provider"). 29 C.F.R. § 825.114(a)(2)(iii) provides that a HN17"serious health condition involving continuing treatment by a health care provider includes . . . any period of incapacity or treatment for such incapacity due to a chronic serious health condition." It further defines a "chronic serious health condition as one which: (A) Requires periodic visits for treatment by a health care provider . . .; (B) Continues over an extended period of time (including recurring episodes of a single underlying condition); [**18] and (C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.)." Id. (emphasis added).

HN18To invoke the FMLA's protection for this qualifying reason, the eligible employee, during his employment, must request leave and give the employer notice that he is requesting such leave for a serious health condition that renders him unable to perform his position's duties. See Brohm, 149 F.3d at 523 (holding that, because the FMLA requires the eligible "employee. . . [to] provide notice and a qualifying reason for requesting the leave," the plaintiff's [***12] FMLA claim cannot lie where he requested medical leave and received medical attention for his serious health condition only after the termination of his employment); Hammon, 165 F.3d at 451 (holding that a FMLA claim does not lie where the plaintiff failed to notify his employer of his qualifying condition and to request leave for such condition during his employment, but, rather,

only did so after his employment had ended). However, HN19the eligible employee need not expressly mention the FMLA as the source of his right to request such [**19] leave. Hammon, 165 F.3d at 451. Rather, the critical test for substantively-sufficient notice is whether the information that the employee conveyed to the employer was reasonably adequate to apprise the employer of the employee's request to take leave for a serious health condition that rendered him unable to perform his job. Brohm, 149 F.3d at 523; Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 725 (6th Cir. 2003) (holding that the plaintiff, as a matter of law, had sufficiently notified his employer during his employment that his request for unforeseeable leave was for a FMLA-qualifying serious health condition when he informed his employer that he had been at the hospital and was unable to work due to an injury from a motorcycle accident).

HN20The eligible employee must also give the employer this substantive notice within the requisite time frame. When the eligible employee's leave for his serious health condition is foreseeable based upon planned medical treatment, he must "provide the employer with not less than 30 days' notice, before the date the leave is to begin." See 29 U.S.C. § 2612(e)(2)(B) (excluding [**20] a situation in which "the date of treatment requires leave to begin in less than 30 days" and requiring the eligible employee, in such a situation, to "provide such notice as is practicable"). In contrast, HN21when the approximate time of the needed leave is unforeseeable, the eligible employee should give the employer notice of the need for the leave "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). "It is expected that

an employee will give notice to the employer within no more than one or two workings days of [***13] learning of the need for leave, except in extraordinary circumstances . . . [in which] such notice is not feasible." Id.

HN22 [*422] Once an employer receives sufficient notice that the eligible employee is requesting leave for a FMLA-qualifying reason, the employer bears the burden to gather any additional information necessary for the leave to fall within the FMLA. Hammon, 165 F.3d at 450. HN23An employer may require the eligible employee to provide, in a timely manner, certification by a health care provider. 29 U.S.C. § 2613(a). HN24Where the leave is due [**21] to a serious health condition of the employee that prevents him from performing his job, the requested certification is sufficient if it states the date upon which the serious health condition began, the condition's probable duration, the appropriate medical facts regarding the condition within the health care provider's knowledge, and a statement that the employee is unable to perform his position's duties. 29 U.S.C. § 2613(b).

HN25The FMLA renders it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right" that it affords. 29 U.S.C. § 2615(a)(1). Furthermore, HN26any violation of the FMLA-or of the regulations implementing it-constitutes such unlawful interference. 29 C.F.R. § 825.220(b) (referencing an employer's refusal to authorize FMLA leave as an illustration of unlawful interference). HN27The FMLA also renders it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the

Act. For example, an employer may neither use an employee's "taking of FMLA leave as a negative [**22] factor in [an] employment action[]" against that employee nor count an employee's FMLA leave under its "no fault" attendance policies. 29 C.F.R. § 825.220(c).

Plaintiff's complaint alleges that defendant unlawfully interfered with plaintiff's exercise of his rights under the FMLA by counting various absences that he alleges were FMLA-qualifying-absences on February 16, 1996; [***14] February 9, 1999; and March 31, 2000-under its "no-fault" attendance policy and by subsequently terminating plaintiff pursuant to that policy. The district court granted summary judgment to defendant on plaintiff's FMLA claim on the ground that plaintiff, as a matter of law, failed to give defendant sufficient notice of a FMLA-qualifying reason for these alleged diabetes-related absences. n7

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n7 Before the district court, defendant argued that any FMLA claim based upon plaintiff's absences on February 16, 1996, and February 9, 1999, was time-barred because plaintiff had received suspensions based upon these absences and that these material adverse actions fell outside of the applicable statute-of-limitations period. See 29 U.S.C. § 2617(c)(1) and (2) (stating that an action may be brought under the FMLA "not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought[,]" except that an action for a willful violation may be brought within 3 years after such time); Butler v. Owens-Brockway Plastic Prods., 199 F.3d

314, 317 (6th Cir. 2000) (holding that a plaintiff's termination claim was not time-barred simply because it was based upon certain time-barred assessments of points for absences where the termination was the first material adverse action, and illustrating such a material adverse action with probation, termination, or a failure to reinstate). Plaintiff countered that the "continuing violations" theory applies so as to toll the statute of limitations here. See Dixon v. Anderson, 928 F.2d 212 (6th Cir. 1991). Defendant, in response, argued that there is no precedential support for the proposition that the "continuing violations" theory applies to the FMLA, as it does to anti-discrimination law. The district court did not expressly determine this statute-of-limitations issue when it held that plaintiff, as a matter of law, had failed to give defendant sufficient notice that his absences on February 16, 1996, and February 9, 1999, were FMLA-qualifying. In any event, defendant, by neither raising it nor presenting any argument on it in its brief, has abandoned the statute-of-limitations argument on appeal. See Sommer v. Davis, 317 F.3d 686, 691 (6th Cir. 2003).

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[*423] 1. March 31, 2000, Absence

On appeal, plaintiff contends that the district court erred in granting defendant summary judgment because plaintiff had timely and sufficiently notified defendant of his need for FMLA leave for his absence on Friday, March 31, 2000, the latest absence triggering his termination under defendant's [***15] attendance policy. On Friday, March

31st, plaintiff called defendant to inform it that he would not be at work. In particular, he stated that he "wasn't doing well and . . . wouldn't be in today." At that time, he did not mention that his absence was in any way related to his diabetic condition. Although plaintiff worked on Saturday and Sunday, April 1st and 2nd, respectively, he made no further mention of the reason for his one-day absence. On April 4th, his next scheduled day of work, plaintiff met with supervisors Arkwright and George regarding his attendance deficiencies. During this meeting, however, plaintiff did not mention his diabetes as the reason for his latest absence. n8 Under defendant's attendance policy, this absence triggered both plaintiff's suspension and his termination because it was his third attendance-related suspension [**24] within five years. On April 5th, plaintiff's wife informed Engle that plaintiff had been absent on March 31st due to a hypoglycemic episode, and that she had attended to him all night due to that episode. On April 6, 2000, plaintiff requested and attended a meeting with Engle. Plaintiff, for the first time, mentioned that his March 31st absence was due to his diabetes. Specifically, plaintiff presented a note from Dr. Dorsey that stated that "severe hypoglycemia due to diabetes" caused the absence and that this absence was, thus, FMLA-qualifying.

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n8 Plaintiff argues that he did not mention his diabetes during the April 4th termination meeting because he was never asked why he had been absent on March 31st. However, this argument is not persuasive. Given that his

supervisors were expressly terminating plaintiff based, in part, upon this absence, a reasonable person in plaintiff's position would have referenced the reason necessitating that absence in an attempt to avert the termination.

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The information that plaintiff [**25] gave defendant-via his wife's statement to Engle or Dr. Dorsey's note-may have been sufficient to convey to defendant that plaintiff's March 31st absence was due to a serious health condition that rendered [***16] him unable to perform his job. n9 See Brohm, 149 [*424] F.3d at 523; 29 C.F.R. § 825.303(b) (noting that HN28an employee's spokesperson, such as a spouse, may give the employer the required notice if "the employee is unable to do so personally"). However, plaintiff, as a matter of law, failed to give defendant notice, even if it were substantively sufficient, within the necessary time frame for unforeseeable leave. n10

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N9 Plaintiff also argues that a genuine issue of material fact exists as to whether he had given defendant sufficient notice when he called in on March 31st and simply stated that he "wasn't doing well and . . . wouldn't be in today." In support, plaintiff relies on Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847 (8th Cir. 2002). In Spangler, the Eighth Circuit held that a genuine issue of material fact regarding notice existed because the defendant employer knew that the plaintiff suffered from depression,

that she had needed FMLA leave for depression in the past, and knew that her latest absence was from "depression again." Id. at 852-53. Here, plaintiff argues that defendant knew that plaintiff has diabetes and that plaintiff had FMLA-qualifying, diabetes-related absences on February 16, 1996, and February 9, 1999-absences for which plaintiff contends defendant unlawfully penalized him. Unlike in Spangler, however, plaintiff did not advise defendant that his March 31st absence was related to a serious health condition-here, diabetes. Moreover, plaintiff's bare statement that he was unwell would not have reasonably apprised defendant that his absence was FMLA-qualifying, given plaintiff's long history of diverse physical maladies, both work-related and non-work-related. Likewise, plaintiff's assertion that he would habitually state only that he was "ill" or "not feeling well" when he was experiencing a diabetes-related illness is unpersuasive. Thus, even if plaintiff's assertions were true-that defendant knew of plaintiff's diabetes and his past need for FMLA leave for diabetes-related absences-, they are insufficient to create a genuine issue of material fact as to whether plaintiff's "call-in" gave defendant sufficient notice that his March 31st absence was FMLA-qualifying. [**26]

n10 To the extent that defendant argues that his notice was temporally sufficient because he met the time requirement for providing the employer-upon its request-of medical certification to support a FMLA-qualifying request for leave, such an argument is misplaced. See 29 U.S.C. § 2613; 29 C.F.R. § 825.311(b). Rather, the issue is whether plaintiff provided defendant with sufficient notice that his

request for leave was for a FMLA-qualifying condition in the first instance.

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[***17]

First, plaintiff failed to give defendant notice "within no more than one or two workings days of learning of the need for leave." 29 C.F.R. § 825.303(a). Defendant did not receive notice from either plaintiff's wife or Dr. Dorsey's letter on or before April 2nd, the second working day after plaintiff learned of the need for the March 31st absence. Plaintiff argues that, although he worked on April 1st and 2nd, he was not required to give notice on or before April 2nd because Saturday and Sunday, the 1st and 2nd of April respectively, [**27] are not normal working days for physicians. However, the applicable regulation imposes no qualification that only the normal working days of physicians be counted in determining the timeliness of an employee's notice. See id. To the extent that plaintiff is implying that he needed to see Dr. Dorsey to be able to give defendant the required substantive notice, we fail to see how Dr. Dorsey possessed any more information pertaining to whether plaintiff's March 31st absence was due to a serious health condition rendering him unable to work than what plaintiff himself possessed. n11 While Dr. Dorsey may have informed plaintiff that the FMLA might cover the absence and provided medical certification to support any such claim, plaintiff need not have specifically mentioned the FMLA nor provided medical certification to meet his initial burden of giving defendant the requisite notice. See Hammon, 165 F.3d at 451; 29 U.S.C. § 2613; 29 C.F.R. §

825.311(b).

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n11 In fact, plaintiff testified that he neither spoke with nor saw Dr. Dorsey on March 31, 2000, for his diabetic condition. Rather, plaintiff first saw Dr. Dorsey regarding his March 31st hypoglycemic episode on April 5th, and Dr. Dorsey's letter was based upon a reading of plaintiff's blood glucometer from the day of the absence.

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In addition, no extraordinary circumstances existed to render it unfeasible for plaintiff to have given defendant the necessary notice on or before April 2, 2000, the second working day following plaintiff's March 31st absence. See 29 C.F.R. § 825.303(a). Plaintiff seems to argue that, because of [***18] the physical effects of his hypoglycemic episode, he was physically unable to inform defendant that his March 31st absence was due to that diabetes-related illness. In support, plaintiff relies upon Dr. Dorsey's letter. In that letter, Dr. Dorsey stated that she believed that plaintiff had been unable to explain or to recognize that he was suffering from "severe hypoglycemia due to diabetes" when he called in on March 31st to report his absence because he had suffered from an extended period of hypoglycemia, which often causes "prolonged physical symptoms, including headache, difficulty thinking [*425] and concentrating, and hypothermia." However, plaintiff testified that he had "stabilized and everything was

fine" by the time that he had returned to work on April 1st. Thus, plaintiff was physically able to give defendant sufficient notice on or before [**29] April 2nd, even if he were physically unable to do so on March 31st.

Plaintiff also argues that, even though defendant knew or had reason to know that he was a diabetic, defendant failed to advise him that the FMLA could cover diabetes-related absences, even those involving only episodic incapacity. Plaintiff testified that he would often report a diabetes-related absence by merely stating that he was "not doing well" and without expressly mentioning his diabetes because defendant had never informed him that the FMLA could cover such an absence. Plaintiff further testified that he did not think that mentioning the diabetes-related cause of the March 31st absence would have made any difference because he had received attendance points for previous absences that he had advised defendant were diabetes-related. Thus, plaintiff argues that, due to defendant's alleged failure to inform plaintiff that the FMLA covered diabetes and permitted intermittent leave for such a condition, plaintiff gave defendant the requisite notice "as soon as [was] practicable under the facts and circumstances." For example, plaintiff testified that he attempted to get medical certification from Dr. Dorsey [**30] for his March 31st absence only after he learned from his wife, on April 5th, that the FMLA could have covered his diabetes-related absences. According to [***19] plaintiff's wife, after she told Engle, on April 5th, that plaintiff's March 31st absence was due to his diabetes, Engle informed her that plaintiff could have taken all of his diabetes-related absences under the FMLA. However, as the record makes clear and as he acknowledged in his

deposition, plaintiff, over the course of his employment, received several informational notices from defendant specifying that the FMLA may cover diabetes as a chronic health condition, whether for episodic or continuing incapacity. Plaintiff testified that he cannot recall ever reading any of these notices, that he might have read through one of them "real quickly," and that, even if he had read one of them, he would not have noticed that it mentioned diabetes. Plaintiff underscored that no one ever "told" him about the FMLA's coverage of diabetes. However, plaintiff's lack of notice, if any, concerning the FMLA's coverage of diabetes stems from his own willful ignorance, not from any culpability on defendant's part. The FMLA does not require [**31] defendant to foresee that plaintiff would not have read the many notices that it had sent regarding the FMLA's coverage and, thus, either to force plaintiff to read those notices or to convey their content to him verbally. Contrary to plaintiff's assertion, his alleged lack of notice concerning the FMLA's coverage of diabetes does not absolve him of his failure to advise defendant that his March 31st absence was diabetes-related on or before April 2, 2000. In sum, we find that plaintiff failed to give defendant the requisite notice that his March 31st absence was FMLA-qualifying in a timely fashion. n12

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n12 First, in so holding, we need not and do not express any opinion upon whether plaintiff was an "eligible employee" for purposes of the FMLA after his termination on April 4, 2000. Plaintiff contends that genuine issues of material fact exist as to whether: 1) his discharge was delayed pending a

grievance process, which ended in June of 2000; 2) whether his employment relationship continued for purposes of FMLA eligibility during that grievance; and 3) whether plaintiff gave sufficient notice for his March 31, 2000, absence during his employment relationship. See Biermann v. ALCOA, 2000 U.S. Dist. LEXIS 21964, No. 3-98-CV-20159, 2000 WL 33362002, at *8 (S.D. Iowa Jan. 21, 2000) (finding a genuine issue of material fact over whether the plaintiff's discharge "was delayed pending resolution of the grievance [process] under the CBA, and thus whether the employer-employee relationship continued for purposes of FMLA eligibility during the grievance process). Plaintiff also argues that his termination was not yet final on April 4th because, according to Hilbreth, she and Engle retained authority to halt the termination. Because we hold, however, that no reasonable jury could find that plaintiff was not required to give the requisite notice on or before April 2, 2000, and that plaintiff, in fact, gave the necessary notice within this time frame, any issues of fact concerning any notice after April 4th are immaterial.

Second, we reject plaintiff's argument that a genuine issue of material fact exists as to whether plaintiff had accumulated enough points to warrant termination. As of December 19, 1999, plaintiff had accumulated seven and one-third attendance points under the old attendance policy. According to the new attendance policy, plaintiff's seven and one-third points converted into two and one-third points. Plaintiff's March 31, 2000, absence resulted in the accumulation of another point, raising his total points to three and one-third and triggering a suspension upon the accumulation of the third point. Plaintiff argues that a genuine issue of material fact exists as to how he received

seven and one-third attendance points under the old attendance policy because George, during his deposition, could count only five and one-third points-a number insufficient for entrance into the new point system-based upon a spreadsheet that plaintiff gave him. However, as previously discussed, because plaintiff's contention relies upon a misconstruction of George's testimony, plaintiff's attempt to manufacture a genuine issue of material fact must fail.

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[*426] 2. Other Alleged Diabetes-Related Absences

The thrust of plaintiff's FMLA claim, per his complaint, is that defendant unlawfully interfered with the exercise of his FMLA rights by counting various absences that he alleges to have been FMLA-qualifying under its "no-fault" attendance policy and by subsequently terminating plaintiff pursuant to that policy. Plaintiff can point to only two instances in which he received attendance points for absences that he allegedly, [***21] expressly informed defendant were diabetes-related-his absences on February 16, 1996, and February 9, 1999. n13

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n13 Although plaintiff contends that he also improperly accumulated points based upon certain absences due to workers' compensation injuries, we decline to consider this

contention because plaintiff has presented no argument as to how these absences relate to and fall under the FMLA. See Sommer, 317 F.3d at 691.

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As to the first instance, plaintiff testified that, on February 16, 1996, he had [**33] informed one of the pharmacists that he was "running late" for work because his "blood sugar [was] acting up." An Early Leave/Late arrival form documents this. He testified that, when he came into work on that day, he told an assistant manager that he was having problems with his blood sugar, and that he would have to see a doctor. n14 A "call-off" form documents that the reason for plaintiff's absence was because his "blood sugar was messed up." Due to this illness, plaintiff missed work from February 16, 1996, through February 20, 1996, with the exception of February 19, 2000, on which plaintiff was not scheduled to work. Plaintiff returned to work on February 21, 1996, the day of his next scheduled shift. After returning to work, plaintiff submitted a note from Dr. Roemer, his family practitioner, dated [*427] February 19, 1996, that stated that plaintiff's absence from February 16th through [***22] February 20th was from the "intestinal flu"; it made no mention of plaintiff's diabetic condition. n15 Plaintiff testified that Carol Blackstone ("Blackstone"), defendant's Benefits Manager, told plaintiff that he should try to have the FMLA cover the absence, and gave him an FMLA form [**34] for his doctor to fill out. n16 Plaintiff further testified that he followed Blackstone's suggestion even though it confused him because he did not know that the FMLA covered the flu. Plaintiff later submitted an

FMLA certification form, signed by Dr. Roemer and dated February 22, 1996, that stated that plaintiff's absence was due to "gastroenteritis" and that he saw plaintiff on February 19, 1996. Defendant denied plaintiff's FMLA certification request on the ground that plaintiff's "gastroenteritis" did not constitute a "serious health condition" under the FMLA.

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n14 Plaintiff also testified that he went to see Dr. Roemer on that day, February 16th, and that he was sure that Dr. Roemer would have given him a medical note for defendant. However, as discussed below, Dr. Roemer's note is dated February 19th, the date which the FMLA form states that Dr. Roemer saw plaintiff. Moreover, a "call-off" sheet on February 19th-for his February 20th absence-states that plaintiff had gone to a doctor on the 19th.

n15 Under defendant's applicable attendance policy, plaintiff, by providing this doctor's note, received only one attendance point for these absences, which spanned four consecutive shifts. [**35]

n16 Blackstone testified that, when she would learn that an employee had been ill for three days and had received medical treatment for the flu, she would always request medical certification in such a situation because the employee could have mis-communicated or misunderstood

his true illness.

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Even if plaintiff had given defendant timely and sufficient notice that his February 16, 1996, absence was diabetes-related and, thus, FMLA-qualifying, plaintiff, as a matter of law, failed to give defendant, upon its request, medical certification that confirmed that this absence was, in fact, caused by plaintiff's diabetes-the condition for which plaintiff would have given defendant the proper notice. n17 See [***23] 29 U.S.C. § 2613(b). In requesting such certification, defendant discharged its duty in seeking any additional information [*428] necessary for the leave to fall within the FMLA. See Hammon, 165 F.3d at 450. Because the medical certification that plaintiff provided was insufficient on its face, the FMLA's provisions governing an employer's request [**36] for re-certification where it "has reason to doubt the validity of the certification" are inapposite. 29 U.S.C. § 2613(c) and (d) (emphasis added). Here, rather than doubting the certification's validity, defendant accepted the certification, including its representation that "gastroenteritis" caused plaintiff's February 16th absence. While plaintiff testified that he went to see Dr. Roemer, his family practitioner, rather [***24] than Dr. Dorsey, his diabetes specialist, because a lot of his illness had to do with the flu, and that the flu had been activating his diabetes, making it "go out of control at the time," there is no evidence that plaintiff relayed this information to defendant. The FMLA does not require an employer to be clairvoyant. n18

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n17 We reject plaintiff's alternative theory that this absence was FMLA-qualifying because it involved incapacity for more than three calendar days and plaintiff received treatment from a healthcare provider. See C.F.R. § 825.114(a)(2). As evidence, plaintiff points to Dr. Roemer's note stating that plaintiff's absence from February 16th through the 20th was due to the intestinal flu and the FMLA certification form stating that Dr. Roemer had seen plaintiff in his office on February 19, 1996. Thus, plaintiff's argument implicitly rests on the theory that the intestinal flu was a FMLA-qualifying serious health condition. To the extent that plaintiff has preserved this argument for appeal, it must, nevertheless, fail.

HN29To constitute a "serious health condition," the condition must involve-along with at least a three-day period of incapacity-treatment for that condition by a health care provider either two or more times or at least once as long as it results in a regimen of continuing treatment under that provider's supervision. 29 C.F.R. § 825.114(a)(2)(i)(A) and (B). Because plaintiff's February 19th visit to Dr. Roemer upon which he relies constituted only one instance of treatment, plaintiff must also demonstrate that this visit involved a regimen of continuing treatment under Dr. Roemer's supervision. While plaintiff testified that Dr. Roemer had prescribed him medication for the intestinal flu, the very FMLA certification document that plaintiff points to as evidence states that the treatment regimen involved only leave from work, rest, and fluids. Yet, as 29 C.F.R. § 825.114(b) makes clear, HN30"bed-rest, drinking

fluids, . . . and other similar activities that can be initiated without a visit to a health care provider . . . [are] insufficient [by themselves] to constitute a regimen of continuing treatment." In addition, 29 C.F.R. § 825.114(c) states that, HN31absent arising complications, the flu is generally not a FMLA-qualifying "serious health condition." While one could argue that plaintiff's diabetes was a condition complicating his flu, plaintiff testified that the only treatment that he received for that absence was from Dr. Roemer, who only treated him for the flu. Thus, such a dual-condition theory would fail for lack of the requisite medical treatment "relating to that same condition." 29 C.F.R. § 825.114(a)(2)(i). [**37]

n18 We note that the "call-off" sheets for February 17th and 20th of 1996, which report that plaintiff was "feeling out of sorts" and "ill," respectively, further demonstrate the expanse of generalized information that defendant had concerning the reason for plaintiff's absence.

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Regarding the second instance, plaintiff testified that, on February 9, 1999, he had told one of his co-workers that he was leaving work early due to a problem with his insulin pump. An Early Leave/Late Arrival form states that plaintiff's early leave was due to a "problem with his insulin pump." Plaintiff neither saw a doctor nor provided a medical confirmation of this problem from a doctor. Plaintiff testified that, before work on February 9, 1999, his

blood sugar was 361 and he was not feeling well. Plaintiff further testified that, although he gave himself a dose of insulin via his pump, his blood sugar spiked to 500 at work and he "was feeling really bad." According to plaintiff, he called Dr. Dorsey from work and she advised him to go home, disconnect the insulin pump, inject a dose of insulin with a needle to [**38] decrease his blood sugar, and then reinsert the insulin pump. Plaintiff testified that, while at home, it took approximately three to four hours before his blood sugar normalized. According to plaintiff, this hyperglycemic episode occurred because the insulin pump had become disconnected from his body, and he did not have to see a doctor because he fixed the problem with the pump.

As stated above, the critical test for substantively-sufficient notice is whether the information that the employee conveyed to the employer was reasonably adequate to apprise the employer of the employee's request to take leave for a serious [***25] health condition that rendered him unable to perform his job. Brohm, 149 F.3d at 523; Cavin, 346 F.3d at 725 (holding that the plaintiff, as a matter of law, had sufficiently notified his employer during his employment that his request for unforeseeable leave was for a FMLA-qualifying serious health condition when he informed his employer that he had been at the hospital and was unable to work due to an injury from a motorcycle accident). Here, the only way that plaintiff's problem with his insulin pump could constitute the [**39] requisite "serious health condition" is if it were "an illness, injury, impairment, or physical or mental condition that involves . . . any period of incapacity . . . due to a chronic serious health condition." 29 C.F.R. § 825.114(a)(2)(iii) (defining

"a chronic serious health condition" as one that "(A) Requires periodic visits for treatment by a health care provider . . .; (B) Continues over an extended period of time . . .; and (C) May cause episodic rather than a continuing period of incapacity (e.g., [*429] . . . diabetes . . .)") (emphasis added). We assume arguendo that defendant had sufficient notice that plaintiff suffered from diabetes as a chronic health condition, and that defendant knew that plaintiff's diabetic condition caused him to use an insulin pump. While plaintiff testified at length about the physical effects that he experienced due to the insulin pump becoming disconnected from his body, plaintiff does not claim that he relayed this information to defendant. n19 Rather, according to plaintiff, he [***26] merely told defendant that he was having a problem with his insulin pump. This statement, as a matter of law, could not have reasonably [**40] apprised defendant that plaintiff's February 9, 1999, absence was due to a "serious health condition," as described above. It is insufficient to give rise to an inference that plaintiff was suffering from any physical impairment or illness or experiencing any period of incapacity. For all defendant knew, the "problem" with the insulin pump simply might have been of a mechanical or minor nature that would not have effected the pump's effectiveness or plaintiff's health. Perhaps, for example, the pump's battery was running low and simply needed to be changed. Similarly, plaintiff's mere statement that he was experiencing a problem with his insulin pump did not reasonably apprise defendant of a condition that rendered him unable to perform his duties. We find that plaintiff, as a matter of law, failed to give defendant sufficient notice that his February 9, 1999, absence was FMLA-qualifying.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n19 In fact, the only evidence in the record that suggests that plaintiff might have relayed this information to defendant is a sworn letter, dated May 24, 2000, by Paul Nunamaker ("Nunamaker"), the pharmacist to whom plaintiff reported his February 9, 1999, absence. In that letter, Nunamaker stated that he knew that plaintiff was having "problems with his blood sugar." However, Nunamaker also stated that he excused plaintiff from work because he believed that plaintiff "was a good judge of how serious the problem truly was." Even construing this letter in the light most favorable to plaintiff, plaintiff did not reasonably apprise defendant that the problem with his blood sugar incapacitated him or rendered him unable to perform his duties. As Nunamaker stated, he did not know "how serious the problem truly was," but, rather, relied on plaintiff to determine whether it warranted him leaving work early. Thus, for all Nunamaker or defendant knew, the problem with the insulin pump may simply have caused plaintiff to experience a minor fluctuation of his blood sugar, prompting plaintiff, out of an abundance of caution, to want to try to repair his insulin pump to avert any potential, substantial fluctuations of his blood sugar.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - [**41]

C. Plaintiff's Motion for Partial Summary Judgment

Plaintiff contends that the district court abused its discretion by failing to rule on plaintiff's motion for leave to

file a motion for partial summary judgment on plaintiff's FMLA claim, which plaintiff had filed on October 30, 2001, before it granted defendant's motion for summary judgment, which defendant had previously filed on September 21, 2001. During a pre-trial conference, the district court ruled that it would hold plaintiff's motion in abeyance pending resolution of defendant's motion for summary judgment. According to defendant, plaintiff never objected to this ruling before the district court. On May 2, 2002, the district court granted defendant's motion for summary judgment on all of plaintiff's [***27] claims. Having already disposed of the entire case on its merits, the district court never expressly ruled upon plaintiff's motion for leave to file a partial summary judgment motion.

The district court did not err in adjudicating defendant's motion for summary judgment before plaintiff's motion for partial summary judgment. See Kennedy v. City of Cleveland, 797 F.2d 297, 305 (6th [*430] Cir. 1986) [**42] (recognizing the discretion of "the trial judge who is charged with the responsibility . . . [of] managing his docket and ensuring an expeditious processing of the litigation"). This management of the motions was clearly reasonable given that defendant's motion was filed before plaintiff's motion and, importantly, that the resolution of defendant's motion could have disposed of the entire case-as it, in fact, did-while the resolution of plaintiff's motion would have disposed of only plaintiff's FMLA claim. Moreover, in granting defendant's motion for summary judgment, the district court expressly found that all of plaintiff's claims failed as a matter of law. Thus, the district court implicitly found that plaintiff's FMLA claim could not succeed as a matter of law, such as to warrant an

award of partial summary judgment to plaintiff on this claim.

For the preceding reasons, we AFFIRM the district court's grant of summary judgment to defendant on plaintiff's federal and state claims alleging disability discrimination and his federal claim alleging a FMLA violation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF OHIO
EASTERN DIVISION

LEE R. BRENNEMAN,	)	CASE NO. 1:01CV1052
	)	
Plaintiff,	)	
	)	
vs-	)	Judge John M. Manos
	)	
MEDCENTRAL HEALTH SYSTEM,	)	
	)	
	)	
Defendant.	)	ORDER

On May 1, 2001, the Plaintiff filed this action alleging disability discrimination under federal and state law, and violation of the federal Family Medical leave Act ("FMLA"). On May 2, 2002, the Court granted summary judgment in favor of the Defendant on all counts (Docket Nos. 60 and 61). On May 13, 2002, the Plaintiff filed a Motion for Reconsideration (Docket No. 62). The parties have fully briefed these issues.

For the following reasons, the motion is DENIED.

The Plaintiff relies on the following two cases for relief: Williams v. Schuller International, Inc., 2002 WL 193929 (6th Cir. February 5, 2002) (unreported), and Cotler v. Ajilon Services, Inc., 287 F.3d 593 (6th Cir.2002). Neither cases warrants relief.

In Williams, the Plaintiff gave an alleged notice of the need for FMLA leave about one month prior to her termination. The Sixth Circuit concluded that issues of fact existed as to whether the notice came sufficiently soon after the first absence, and whether it was sufficiently detailed.

In this case, however, the Plaintiff had *two* opportunities *before* his termination to indicate that his final absence was due to diabetes, but he did not do so. First, he made no mention of his diabetes on March 31, 2000, the day of his final absence. Second, he made no mention of his diabetes at the meeting with his supervisors

on April 4, 2000, at the end of which he was terminated. It was not until after his termination that he indicated he was allegedly absent because of his diabetes. Williams does not support the proposition that a post-termination notice under these circumstances can be the basis of an FMLA claim. I addition, the plaintiff in Williams did not have the long history of attendance deficiencies like that present here.

Cotler also does not warrant reconsideration. In Cotler, the Sixth Circuit affirmed summary judgment on a claim for disability discrimination, restating existing law as to how a disability discrimination claim must be assessed. The Plaintiff here has not presented any evidence that diabetes caused any, let alone a significant number, of his 227 attendance deficiencies. In addition, he cannot overcome the fact that he admitted that he never requested an accommodation for diabetes (Brenneman Dep. at 122.) He also has not presented any evidence in support of the

proposition that his discharge for attendance deficiencies was a pretext for discrimination.

On June 5, 2002, the Defendant submitted a Bill of Costs for $1731.80 for court reporter fees and transcript costs (Docket No. 65). In its previous opinion, however, the Court ruled that each party shall bear its own costs. The Court concludes that there are no grounds to reverse its previous determination on costs. Accordingly, the Court restates its ruling that each party shall bear its own costs.

For the foregoing reasons, the Plaintiff's Motion For Reconsideration (Docket No. 62) is DENIED. Each party shall bear its own costs.

IT IS SO ORDERED.

Issued:
August 19, 2002

s/ John M. Manos
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF OHIO
EASTERN DIVISION

LEE R. BRENNEMAN,	)	CASE NO. 1:01CV1052
	)	CASE NO. 1:01CV 1327
Plaintiff,	)	
	)	
vs-	)	Judge John M. Manos
	)	
MEDCENTRAL HEALTH SYSTEM,	)	
	)	
Defendant.	)	ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned cases this date, the Motion For Summary Judgment of Defendant MedCentral Health System (Docket No. 23) is GRANTED. Accordingly, these actions are hereby dismissed with prejudice, each party to bear its own costs.

IT IS SO ORDERED.

Issued:
May 2, 2002

s/ John M. Manos
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF OHIO
EASTERN DIVISION

LEE R. BRENNEMAN,	)	CASE NO. 1:01CV1052
	)	CASE NO. 1:01CV1327
Plaintiff,	)	
	)	
vs-	)	Judge John M. Manos
	)	
MEDCENTRAL HEALTH SYSTEM,	)	
	)	
	)	MEMORANDUM
Defendant.	)	OF OPINION

On May 1, 2001, and June 1, 2001, respectively, Lee R. Brenneman, plaintiff, filed these actions against MedCentral Health System, defendant. The Plaintiff alleges employment discrimination and related claims under both federal and Ohio law. On September 21, 2001, the Defendant filed a Motion For Summary Judgment (Docket No. 23). The parties have fully briefed these issues.

For the following reasons, the motion is GRANTED.

I. FACTS

The Defendant operates three hospitals in Ohio and employs approximately 2400 people. (Hildreth Aff. at ¶ 1.)[1] The plaintiff began his employment with the Defendant in 1973 as a Pharmacy helper, and was promoted to Pharmacy technician in 1975. He remained at this position until th termination of his employment on April 4, 2000. (Brenneman Dep. at 31-35.)[2]

The Plaintiff testified at deposition that he was diagnosed with diabetes in 1968. Although he occasionally

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1. The affidavit of Beth Hildreth, the Defendant's Director of Human Resources, is attached as Exhibit E to the Defendant's Appendix of Exhibits submitted in support of its motion.

2. Pertinent portions of the transcript of the Plaintiff's deposition are attached as Exhibit F to the Defendant's Appendix of Exhibits. Pertinent exhibits to the Plaintiff's deposition transcript are attached as Exhibit G to the Defendant's Appendix of Exhibits.

has episodes of hypoglycemia, his condition is, for the most part, effectively controlled with insulin. During bouts of hypoglycemia, he can experience seizures, shock, and/or lightheadedness and incoherence. His condition has worsened with age, and he has used an insulin pump since 1998 to control his condition. He also regulates his diet, exercises, and monitors his blood sugar level throughout the day using a glucometer. (Brenneman Dep. at 59-68.)

During the course of his employment, the Plaintiff has had substantial attendance deficiencies. According to his employment records, during the last five years of his employment he was absent 193 times and arrived late an additional 34 times. [3] These dates do not include vacation

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3. The Plaintiff disputes the exact number of absences, but admits that he was absent over a hundred times. However, the Court has reviewed the employment records submitted with the Defendant's motion, particularly those attached to the affidavit of Brian George. Such records support the Defendant's calculation.

and similar approved days off. As stated above, the Plaintiff has diabetes. However, the absences primarily relate to other medical problems, including six work-related injuries and other general illnesses. He was granted leave pursuant to the Family Medical Leave Act on five occasions, but not for diabetes. The Defendant claims that the Plaintiff *never* requested medical leave for diabetes, and its position is supported by the employment records. (Forchione Aff. at ¶¶ 2-4; George Aff. at ¶ 2.)[4]

Pursuant to the Defendant's attendance policy, the Plaintiff was disciplined numerous times for his attendance deficiencies. The disciplinary actions included various

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4. Lee Ann Forchione is currently a Human Resources Representative for the Defendant, and has experience with its attendance policies and workers compensation claims administration. Her affidavit is attached as Exhibit D to the Defendant's Appendix of Exhibits. Brian George is the Defendant's Assistant Director of Pharmacy Services and was one of the Plaintiff's supervisors at the time of his discharge. His affidavit is attached as Exhibit B to the Defendant's Appendix of Exhibits.

verbal and written warnings, and suspensions in 1996 and 1999. Each disciplinary form provides an opportunity for the employee to respond, but the Plaintiff did not respond to any of the disciplinary actions. On March 31, 2000, the Plaintiff was absent again triggering another suspension. Under the Defendant's attendance policy, any employee who receives three suspensions within five years is subject top termination. (Brenneman Dep. at 46-58, Ex. 1; George Aff. at ¶¶ 3-4.)

During his deposition, the Plaintiff could only specifically recall to instances in which he allegedly informed the Defendant that an attendance problem was due to diabetes. The first instance was February 16, 1996. He testified that he informed a pharmacist in his department that he was "running late" for work because his blood sugar was "messed up". However, the doctor's note he submitted upon return indicates "intestinal flu" as the reason for

absence. The second instance occurred on February 9, 1999. He testified that he told his co-workers that he was leaving due to a problem with his insulin pump. He did not see a doctor not provide a written medical confirmation from a doctor. He cannot recall any other instance in which he informed the Defendant that diabetes was the cause of an absence. (Brenneman Dep. at 79-93, Exs. 2-5.)

As to the absence on March 31, 2000, the Plaintiff called to inform the Defendant that he would not be at work. He did not, however, indicate at that time that his diabetes was the reason for the absence. On April 4, 2000, the Plaintiff met with his supervisors regarding his attendance problems, and again he did not reference his diabetes as the reason for his latest absence. At the conclusion of the meeting, he was terminated pursuant to the Defendant's attendance policy because he was subject to his third suspension in five years. (Brenneman Dep. at

93-94, 100-06.)

On April 6, 2000, the Plaintiff attended a final exit interview with Bruce Engle, the Defendant's Vice President of Human Resources. This meeting was the first time the Plaintiff raised the issue of his diabetes by presenting a note from his doctor stating that hypoglycemia caused the absence on March 31. He first stated that he had spent the entire day in bed. Engle, however, had been informed that Plaintiff went to see his workers compensation doctor the same day for reasons unrelated to his diabetes. When Engle confronted the Plaintiff with this information, the Plaintiff acknowledged that he had not spent the entire day in bed. Based on the results of the exit interview, the termination was made final. (Brenneman Dep. at 95-96, 111-15, Exs. 7 and 8; Hildreth Aff. at ¶ 6.)

On May 1, 2001, the Plaintiff filed his first action alleging disability discrimination and related claims under

federal and Ohio law. On June 1, 2001, the Defendant removed a second action from state court, in which the Plaintiff alleges additional claims arising out of the same events, including a violation of the Family Medical Leave Act.

On November 1, 2001, the Plaintiff filed his Second Amended Complaint essentially consolidating the two actions. He asserts the following six counts: (1) disability discrimination in violation of the Americans With Disabilities Act ("ADA"); (2) disability discrimination in violation of Ohio Revised Code ("O.R.C.") Chapter 4112; (3) promissory estoppel under Ohio law; (4) intentional infliction of emotional distress under Ohio law; (5) violation of the federal Family Medical Leave Act ("FMLA"); and (6) wrongful discharge against public policy under Ohio law. The Defendant has moved for

summary judgment as to all claims.[5]

II. LAW AND ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S.

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5. Although the Defendant filed its motion before the Plaintiff filed the Second Amended Complaint, the arguments and reasoning in the motion cover all remaining claims.

317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The substantive law identifies which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 256 (citing Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586

(1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. Anderson, 477 U.S. at 247-48.

B. Discrimination Claims

Counts I and II respectively allege disability discrimination under the federal ADA and O.R.C. Chapter 4112. Under O.R.C. Chapter 4112, Ohio courts apply the same standard for assessing employment discrimination claims as that used by federal courts under the federal anti-discrimination statutes. Dews v. A.B. Dick Co., 231 F.3d 1016, 1020 n.2 (6th Cir. 2000); Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992); Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission, 421 N.E.2d 128, 131-32 (Ohio 1981).

A claim for discrimination can be proven either by direct evidence of discrimination, or by circumstantial

evidence pursuant to the McDonnell Douglas standard. The parties recognize that the McDonnell Douglas analysis must be applied here. Under this analysis, the Plaintiff must first establish a *prima facie* case of discrimination by showing that: (1) he is a member of a protected group; (2) he was subjected to an adverse employment decision; (3) he was qualified for the position at issue; and (4) he was replaced by, or treated less fairly than, a person outside of the protected group. Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2106 (2000), citing, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Ensley-Gaines v. Runyon, 100 F.3d 1220, 1224 (6th Cir. 1996); Tally v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995).

Specifically, with respect to a claim for disability discrimination, the elements of the *prima facie* case are defined as follows: (1) the Plaintiff is"disabled" as that

term is defined in the ADA and accompanying regulations; (2)he was subjected to an adverse employment decision; (3) he was qualified for the position at issue, eithe5r with or without a reasonable accommodation; (4) the Defendant knew or had reason to know of the disability; and (5) he was replaced by, or treated less fairly than, a non-disabled person. Plant v. Morton, 212 F.3d 929, 936 (6th Cir. 2000); Martin v. Barnesville Exempted Village School District Board of Education, 209 F.3d 931, 934 (6th Cir.), cert. denied, 531 U.S. 992 (2000); Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F. 3d 775 , 779 (6th Cir. 1998).

If the Plaintiff can establish a *prima facie* case of discrimination, the Defendant must produce evidence of a legitimate, non-discriminatory business reason for the adverse employment action. This burden is merely one of production and is satisfied is the Defendant offers

admissible evidence by which a trier of fact can conclude that the Plaintiff was treated as alleged for a non-discriminatory business reason. If the Defendant meets the burden of production, to prevail the Plaintiff must prove that the asserted reason is a pretext for discrimination. Reeves, 120 S.Ct. at 2106; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08 (1993); Manzer v. Diamond Shamrock Chemicals, Inc., 29 F.3d 1078, 1081-84 (6th Cir. 1994); Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992).

The Defendant argues that the Plaintiff was not qualified because he could not satisfy its attendance requirements. Generally, an employee who cannot satisfy attendance requirements is not qualified and thus not protected under the ADA. Gantt v. Wilson Sporting Goods Co., 143 F. 3d 1042, 1047 (6th Cir. 1998).; Hypes v. First Commerce Corp., 134 F.3d 721, 726-27 (5th Cir. 1998). An

attendance policy that is uniformly applied cannot be the bass of an ADA claim even if it results in the termination of a disabled employee. Gantt, 143 F.3d at 1046. Here, the Defendant has a uniform attendance policy by which points ar assessed for absences and partial absences. The policy imposes increasing levels of discipline leading up to sus0pension. An employee whose points result in a third suspension in five years is subject to termination. The plaintiff was terminated under this policy. His inability to satisfy basic attendance requirements renders him unqualified.

In Cehrs, supra, the Sixth Circuit held that under certain circumstances, medical leave, even for an extended period of time, might be a "reasonable accommodation" that should be afforded a disabled employee under the ADA. Cehrs, 155 F.3d at 781-83; see also Walsh v. United Parcel Service, 201 F.3d 718, 726-27 (6th Cir. 2000)(request

for medical leave under Cehrs must be reasonable). Cehrs, however, is not applicable to the Plaintiff's case.

First, the Plaintiff never requested any accommodation for his diabetes. The ADA requires that an employee request an accommodation because the employer does not have to speculate as to the extent of the disability, or the need for an accommodation. Gantt, 143 F.3d at 1046-47. At deposition, the Plaintiff admitted that he never requested an accommodation. Indeed, he testified that his co-workers were understanding about his needs to test his blood sugar and change his insulin pump. (Brenneman Dep. at 122.) Absent a request, the Defendant was not obligated to afford any accommodation.

Second, there is no evidence that the diabetes was the source of the Plaintiff's attendance deficiencies. The employment records demonstrate that in the last five years of his employment, he was absent 193 times and late

another 34 times. Of all these, he could specifically recall only two that allegedly were caused by his diabetes. He testified that on February 16, 1996, he called work to indicate that he was "running late" because his blood sugar was "messed up". The medical note for the incident, however, indicates that intestinal flu was the reason for the lateness and makes no mention of diabetes. As to the second incident, he allegedly left early on February 9, 1999 because of a problem with his insulin pump. However, he did not provide written confirmation of any medical problem. Accordingly, the employment records do not demonstrate that these two incidents were caused by diabetes. Furthermore, even assuming that these two incidents in fact stemmed from diabetes, there is no evidence in the record connecting any of the other 225 incidents to his diabetes. Therefore, he cannot base his claim on any alleged refusal to accommodate him by

granting medical leave for his diabetes.

The Court concludes that the Plaintiff was not qualified as a matter of law. All evidence shows that he was terminated pursuant to the Defendant's uniform attendance policy because his attendance deficiencies resulted in three suspensions in five years. Furthermore, there is no evidence that the employment deficiencies stemmed from his diabetes. Because he is not qualified, he cannot establish a *prima facie* case of disability discrimination. Accordingly, summary judgment is warranted as to Counts I and II.[6]

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6. The Defendant also asserts that the Plaintiff cannot establish a *prima facie* case because he is not disabled under the ADA. The Defendant argues that the Plaintiff is nor disabled because his diabetes generally is controlled by insulin, diet, and exercise. See Sutton v. United Airlines, Inc., 119 S.Ct.2139, 2143 (1999)(wether a person is disabled is determined accounting for measures that mitigate the condition). At deposition, however, he testified that his diabetes has worsened with age, and that he still occasionally suffers from bouts of hypoglycemia that may cause seizures, shock, or incoherence. Because he does not offer evidence sufficient to raise a genuine issue of fact as to other elements of this discrimination claims, the Court need not

Even assuming that the Plaintiff can establish a *prima facie* case, the Defendant still is entitled to summary judgment on the discrimination claims. The Defendant has produced evidence essentially asserting the following legitimate, non-discriminatory business reasons for the Plaintiff's termination: (1) his termination was warranted pursuant to the Defendant's attendance policy because his attendance deficiencies resulted in three suspensions in five years; and (2) his apparent dishonesty during the final exit interview with Engle. To avoid summary judgment, therefore, the Plaintiff must present evidence sufficient to establish a genuine issue for trial as to whether the asserted reasons comprise a pretext for discrimination.

Pretext may be proven by showing that the reasons proffered for the adverse employment decision (1) have no basis in fact, (2) did not actually motivate the discharge, or;

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address whether he is disabled as defined under the ADA.

(3) were insufficient to motivate the discharge. A Plaintiff's mere denial of the Defendant's proffered reasons is insufficient to avoid summary judgment. Godfredson v. Hess & Clark, Inc., 173 F.3d 365,; Manzer, 29 F.3d at 1084. However, evidence that the asserted reasons are false overcomes a motion for summary judgment because the trier of fact may (but is not compelled to) infer the ultimate fact of discrimination from the falsity of the employer's explanation. Reeves, 120 S.Ct. at 2108-09, citing, Hicks, 509 U.S. at 511.

The plaintiff has not presented any evidence of pretext. As stated above, the Defendant has a uniform attendance policy comprising a point system by which points are assigned for each absence or partial absence. Under this system, the Plaintiff had 193 absences and 34 late arrivals in the I've years before his termination. Based on his own deposition testimony, at most only two of these

incidents were related to his diabetes. On March 31, 2000, he was absent again, but at that time did not reference his diabetes. This absence triggered his third suspension in five years, which by the terms of the attendance policy, warrants termination. Because his termination stems from application of the attendance policy, there is no basis to conclude that his poor attendance record is a pretext for discrimination.

Despite the terms of the attendance policy, the plaintiff had the opportunity to explain his final absence. On April 4, 2000, he met with his supervisors, but never mentioned his diabetes. As a result, he was terminated. Because the Plaintiff did not indicate the absence was due to his diabetes, there is no basis to conclude that the Defendant discriminated against him.

On April 6, 2000, he had his final exit interview with Engle. This meeting is the first time the Plaintiff

indicates that diabetes caused the absence on march 31. He informed Engle that he had been I bed all day suffering from hypoglycemia, and provided a doctor's note supporting this claim. Engle, however, was aware that the Plaintiff had gone to his workers compensation doctor. Indeed, the Plaintiff testified that the appointment was *in the morning* at about 10:30, contradicting his statement to Engle that he had to stay in bed all day. *According to the Plaintiff's own deposition testimony,* after several attempts at prodding him for the truth, Engle explicitly confronted him about the appointment, after which he admitted it. Although the exit interview was only a week after the absence, the Plaintiff claimed to have forgotten about the appointment. Engle apparently did not believe him, and the termination was made final. (Brenneman Dep. at 95, 114-15.) Nothing about the exit interview supports an inference of pretext. If anything, the interview further demonstrates

the legitimacy of the termination.

For the foregoing reasons, the Defendant is entitled to summary judgment on Counts I and II for disability discrimination.

C. FMLA

In Count V, the Plaintiff assets that his termination violates the FMLA. This Act generally provides that eligible employees are entitled to up to twelve weeks of medical leave during any twelve month period because of a serious health condition that renders the employee unable to perform essential job functions. 29 U.S.C § 2612(a). The employee, however, must request or give notice to the employer of a qualifying reason for the medical leave. Brohm v. JH Properties, Inc., 149 F.3d 517, 523 (6th Cir. 1998). The notice need not explicitly invoke the FMLA, but must give the employer sufficient information to reasonably conclude that an FMLA-qualifying event has

occurred. Brohm, 149 F.3d at 523; Hammon v. DHL Airways, Inc., 165 F.3d 441, 450-51 (6th Cir. 1999).

As stated above, the Plaintiff only recalls two incidents prior to his termination in which he allegedly missed work because of his diabetes- February 16, 1996 and February 9, 1999. Both these incidents are described above. As to the first date, his doctor's note indicates only that he had "intestinal flu", which would not qualify for leave under the FMLA. As to the second date, he only informed his co-workers generally that he was having problems with his insulin pump. He did not see a doctor, nor provide any additional explanation or confirmation of his illness. The Court concludes that there was insufficient notice under the FMLA a matter of law.

His conduct with respect to his final absence, on March 31, 2000, likewise does not comport with the requirements of the FMLA. On the day of the absence, he

made no mention of his diabetes. Even assuming he was too ill to do so on that day, he also did not reference his diabetes when he met with his supervisors on April 4, 2000. He was terminated at the end of that meeting. Once an employee is terminated, he is no longer an "eligible employee" under the FMLA. Brohm, 149 F.3d at 523.

The Plaintiff did not contact his doctor to obtain a written medical explanation until April 5, 2000, after his termination. The Plaintiff, however, had not seen or spoken to his treating physician on the day of his absence. He visited his workers compensation doctor- and had a morning appointment- which belies his contention that he was too ill to work. He presented his medical excuse to Engle at the exit interview on April 6, 2000. The Court concludes that his post-termination explanation is insufficient to raise and fact issues under the FMLA.

For the foregoing reasons, the Defendant is entitled to summary judgment on Count V.

D. Remaining State Law Claims

Counts III, IV, and VI assert related claims under Ohio common law. Count III asserts a claim for promissory estoppel, which requires proof of the following elements: (1) there was a promise, clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance was reasonable and foreseeable; and (4) injury caused by the reliance. Healey v. Republic Powdered Metals, Inc., 619 N.E.2d 1035, 1037 (Ohio App. 1992). When the claim is based on a termination from employment, there must have been a clear promise of continued employment. Wing v. Anchor Media, Ltd. of Texas, 59 Ohio St.3d 108, 110 (1991); Thatcher v. Goodwill Industries of Akron, 690 N.E.2d 1320, 1330 (Ohio App. 1997).

The Plaintiff relies on the employee handbook issued by the Defendant. The handbook, however, explicitly states that nothing in the handbook can be construed as a guarantee of continued employment. Therefore, the first element of promissory estoppel is not satisfied. The Plaintiff responds that the handbook states that employment will not be terminated for any reason prohibited by law. Because the Court concludes that the Plaintiff's termination did not violate any laws, this argument lacks merit.

Count IV asserts a claim for intentional infliction of emotional distress, which requires proof of the following elements: (1) the Defendant intended to cause the Plaintiff serious emotional distress; (2) the Defendant's conduct was extreme and outrageous; and (3) the Defendant's conduct proximately caused the Plaintiff severe emotional distress. Phung v. Waste Management, Inc., 71 Ohio St.3d 408, 411

(1994). The Court's analysis of the evidence with respect to the other counts mandates the conclusion that no genuine issue exists for trial as to any of these elements.

Count VI asserts a claim for wrongful discharge against public policy, which requires proof of the following elements: (1) a clear public policy exists and is manifested in a state or federal constitution, statute, administrative regulation, or common law; (2) dismissing employees under the circumstances at issue would jeopardize the public policy; (3) the Plaintiff's dismissal was motivated by conduct related to the public policy; and (4) the employer lacked an overriding legitimate business justification for the dismissal. In short form, these elements commonly are referred to as clarity, jeopardy, causation, and lack of overriding justification. Kulch v. Structural Fibers, Inc., 78 Ohio St.3d 134, 151 (1997), cert. denied, 522 U.S. 1008 (1997); see also Painter v. Graley, 70 Ohio St.3d 377, 384-

85 (1994); Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228, 233-35 (1990); Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 375 (6th Cir. 1999) (applying Ohio law).

The third and fourth elements are dispositive. These elements are similar to the "pretext" element under the discrimination claims. The Court concluded above that the Plaintiff's termination essentially resulted from a straight-forward application of the Defendant's uniform attendance policy. Furthermore, the Defendant did not act in violation of the anti-discrimination statutes or FMLA. For these reasons, there is no genuine issue of fact on the wrongful discharge claim.

III. CONCLUSION

For the foregoing reasons, the Motion For Summary Judgment of Defendant MedCentral Health System (Docket No. 23) is GRANTED. Accordingly, these actions are

hereby dismissed with prejudice, each party to bear its own costs.

IT IS SO ORDERED.

Issued:
May 2, 2002

s/ John M. Manos
UNITED STATES DISTRICT JUDGE

(3)

Supreme Court, U.S.
FILED
JAN 11 2005
OFFICE OF THE CLERK

No. 04-645

IN THE

Supreme Court of the United States

LEE BRENNEMAN,

Petitioner,

v.

MEDCENTRAL HEALTH SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Court of Appeals' determination that Petitioner failed to provide adequate notice of his alleged need for leave under the Family Medical Leave Act, based upon Petitioner's various assertions that the Court of Appeals misapplied the law.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

MedCentral Health System does not have a parent corporation and no publicly held company owns 10% or more of MedCentral Health System's stock.

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INTRODUCTION

Respondent MedCentral Health System ("MedCentral") respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. As discussed below, the Court of Appeals correctly applied well-established rules of law in determining that Petitioner failed to provide adequate notice of his alleged need for leave under the Family and Medical Leave Act ("FMLA").

STATEMENT OF THE CASE

MedCentral formerly employed Petitioner Lee Brenneman as a pharmacy technician. This case results from MedCentral's April 2000 termination of Brenneman's employment under MedCentral's no-fault attendance policy.

Brenneman compiled a significant history of absenteeism during his tenure at MedCentral. During the final five years of his employment alone, Brenneman was absent from work, late, or left early on 227 occasions. Brenneman failed to attribute any of his absences to his diabetic condition while he was employed at MedCentral.

Brenneman's final absence, which triggered his termination, occurred on March 31, 2000. That morning, Brenneman called in to work and stated that he "wasn't doing well and ... wouldn't be in today." Brenneman never communicated that his March 31st absence was allegedly related to his diabetic condition in the days thereafter, including three days that he worked. Brenneman also failed to mention his diabetes during his termination meeting on April 4, 2000. It was not until April 5, 2000, the day after his

termination and nearly a week after his final absence, that Brenneman's wife first claimed that Brenneman's diabetes had caused his March 31st absence.

Contrary to the assertion in Brenneman's Statement of the Case, during Brenneman's employment MedCentral provided him with no fewer than three separate, written notices discussing the FMLA and specifically providing that diabetes may be a covered condition under the FMLA. Also contrary to the assertion in his Statement of the Case, and as noted above, Brenneman failed to make any mention prior to his termination that his diabetic condition had allegedly caused his final absence.

REASONS FOR DENYING THE PETITION

The Sixth Circuit Court of Appeals' decision is consistent with the uniform holdings of other federal courts and the FMLA's regulations. Each of Brenneman's arguments to the contrary is addressed in turn below.

I. The Sixth Circuit Did Not Create a New Test or Otherwise Alter Previously Established Standards Regarding the Sufficiency of an Employee's Notice Under the FMLA.

Brenneman's argument that the Sixth Circuit's use of the phrase "substantively-sufficient notice" somehow changed the "test" for the sufficiency of notice under the FMLA is unsupported and incorrect. [Pet., at 7-11]. The Sixth Circuit and other federal courts previously have held that an employee has the initial obligation of providing an employer

with sufficient information to determine that the FMLA may be implicated with respect to a particular absence:

> [T]o invoke the protection of the FMLA, an employee must provide notice and a qualifying reason for requesting the leave. While the employee need not actually mention the FMLA by name, "[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition."

Brohm v. J.H. Properties, Inc., 149 F.3d 517, 523 (6th Cir. 1998) (quoting *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995)); *see also Seaman v. CSPH, Inc.*, 179 F.3d 297, 302 (5th Cir. 1999) ("In requesting leave, an employee need not invoke the specific language of the statute, but must apprize the employer of the request for time off for a serious health condition"); *Browning v. Liberty Mutual Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999) ("Under the FMLA, an employer's duties are triggered when the employee provides sufficient information to put the employer on notice that the employee may be in need of FMLA leave"), *cert. denied*, 528 U.S. 1050 (1999); *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1436 (11th Cir. 1997) (an employee must provide his or her employer with sufficient information to make the employer aware that an absence results from a potentially FMLA-qualifying reason).

As recognized by these and other courts, an employee must necessarily provide his or her employer with *substantive* notice of the reason for an absence if the employer is to determine that the absence is FMLA-qualifying. In other words, the substance of an employee's notice must inform

the employer of the employee's serious health condition. Accordingly, the Sixth Circuit's mention of the need for "substantively-sufficient notice" is consistent with the notice requirements uniformly recognized by other federal courts.

The Sixth Circuit's use of the phrase "substantively-sufficient notice" also serves to distinguish the FMLA's requirement of adequate, substantive notice from the separate requirement that an employee provide timely notice of the need for leave. *See* 29 C.F.R. § 825.303(a) (in the event of unforeseeable leave an employee must "give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible"). That is, the Sixth Circuit's specific mention of "substantively-sufficient notice" also serves to differentiate these two separate requirements for "sufficient" notice under the FMLA – substantive notice and timely notice.

II. The Lower Courts Properly Determined the Sufficiency of Notice in this Case as a Matter of Law.

Also incorrect is Brenneman's argument that the lower courts improperly determined the sufficiency of his alleged notice of the need for FMLA leave as a matter of law. [Pet., at 11-14]. The Sixth Circuit previously has held that the sufficiency of an employee's notice of his or her need for FMLA leave may be determined as a matter of law. *See Cavin v. Honda of America Mfg., Inc.*, 346 F.3d 713, 723 (6th Cir. 2003) ("Although it is within the province of the jury to determine the facts of the notice given, it is for the court to determine whether those facts are sufficient reasonably to give an employer notice as required by the FMLA"). Consistent with this approach, several other courts have

found an employee's notice of the need for FMLA leave insufficient as a matter of law. *See, e.g., Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980-81 (5th Cir. 1998) (statements to employer that employee was "sick" and experiencing "a lot of pain in her side" constituted insufficient notice as a matter of law under the FMLA), *cert. denied*, 525 U.S. 826 (1998); *Gay v. Gilman Paper Co.*, 125 F.3d at 1435-37 (statement to employer that plaintiff was in the hospital having some tests constituted insufficient notice as a matter of law under the FMLA); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148-49 (8th Cir. 1997) (statement to employer that employee was "sick" and would be "out" from work constituted insufficient notice as a matter of law under the FMLA).

In this case, there existed no factual disputes with respect to the content of the notice given by Brenneman – Brenneman mentioned only that "he wasn't doing well and . . . wouldn't be in today." Brenneman provided no information even suggesting that his absence might be related to a serious health condition. Based upon these undisputed facts, the lower courts properly determined that Brenneman provided insufficient notice as a matter of law.

III. The Sixth Circuit's Holding is Consistent with the FMLA's Regulations.

Brenneman makes three separate arguments regarding the Sixth Circuit's application of the FMLA's regulations in the final portion of his Petition. These arguments are baseless.

First, Brenneman argues that MedCentral was required to provide him with a notice of FMLA rights and procedures every time that he was absent from work. [Pet., at p. 16-17].

The FMLA requires no such action, however. As discussed above, an employee has the initial obligation of providing an employer with reasonable notice that the employee is requesting time off for a serious health condition. *Seaman v. CSPH, Inc.*, 179 F.3d at 302; *Brohm v. J.H. Properties, Inc.*, 149 F.3d at 523; *Gay v. Gilman Paper Co.*, 125 F.3d at 1436. Without such notice from the employee, an employer has no way of knowing that an absence may be covered by the FMLA.

Logically then, the FMLA's regulations do not require an employer to provide written notice detailing the specific expectations and obligations of an employee taking FMLA leave *until* the employee first provides notice of the need for FMLA leave. *See* 29 C.F.R. § 825.301(c). In this case, Brenneman failed to provide notice of his alleged need for FMLA leave.

Second, Brenneman argues, based upon unspecified rules of statutory construction, that the Sixth Circuit interpreted too narrowly the FMLA regulation addressing the timeliness of an employee's notice of the need for unforeseeable FMLA leave. [Pet., at 20-23]. The applicable regulation provides, in pertinent part:

> When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of

> learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.

29 C.F.R. § 825.303(a).

Contrary to Brenneman's arguments, the regulation does not allow for latitude in all cases in which an employee fails to provide timely notice of the need for FMLA leave. Rather, the regulation allows for latitude only in the event of "extraordinary circumstances where such notice is not feasible." *Id.* In this case, Brenneman provided no evidence of any circumstances that would have justified his subsequently working three days and waiting nearly a week before providing any information regarding the alleged reason for his absence.

Finally, Brenneman argues that other courts have denied summary judgment to employers on the issue of the sufficiency of an employee's substantive notice of the need for FMLA leave. [Pet., at 24-29]. Of course, this does not mean that Brenneman provided sufficient notice in this case. As discussed above, the content of Brenneman's alleged notice was undisputed. Brenneman simply provided no information that would have allowed MedCentral to determine that his absence was allegedly caused by a serious health condition.

CONCLUSION

For all the foregoing reasons, Respondent MedCentral Health System respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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